Office - Supreme Court, U.S.
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NOV 5 1981
ALEXANDER L. STEVAS,

No. 80-1690

In the Supreme Court of the United States

OCTOBER TERM, 1981

AMERICAN MEDICAL ASSOCIATION,
CONNECTICUT STATE MEDICAL SOCIETY,
NEW HAVEN COUNTY MEDICAL ASSOCIATION, INC.,
PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

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QUESTIONS PRESENTED

1. Whether, in light of extensive evidence and detailed findings showing that a substantial part of the business carried on by the American Medical Association and its constituent state and local medical societies is for the profit of their members, the Federal Trade Commission properly determined that such associations are "corporations" subject to the jurisdiction of the Commission under Sections 4 and 5(a)(2) of the Federal Trade Commission Act.

2. Whether, in light of substantial evidence supporting the Commission's findings (a) that the American Medical Association, its constituent state and local medical societies, and their members had engaged in a conspiracy to impose anticompetitive restrictions on advertising, solicitation, and contract practice by physicians, and (b) that there is a cognizable danger of a recurrence, the Commission abused its discretion by entering a cease-and-desist order tailored to remedy the violations.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-31a) is reported at 638 F.2d 443. The Commission's opinion and order (Pet. App. 312a-373a) and the initial decision of the Administrative Law Judge (Pet. App. 37a-312a) are reported at 94 F.T.C. 701.

JURISDICTION

The judgment of the court of appeals was entered on October 7, 1980. A petition for rehearing was denied on November 25, 1980 (Pet. App. 375a). Justice Marshall extended the time for filing a petition for a writ certiorari to and including April 8, 1981. The petition was filed on that date and was granted on June 22, 1981. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

Pertinent portions of Sections 4 and 5(a) of the Federal Trade Commission Act, 15 U.S.C. 44 and 45(a), are set forth at Pet. Br. App. a-1 to a-2.

STATEMENT

In December 1975, the Federal Trade Commission issued an administrative complaint (Pet. App. 33a-35a) alleging that petitioners had conspired to restrain competition between physicians by agreeing to prevent or hinder their members from advertising or otherwise soliciting business, and from engaging in price competition and other competitive practices, all in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. After hearings in 1977 and 1978, an Administrative Law Judge (ALJ) concluded, in an exhaustive opinion, that petitioners were subject to the Commission's jurisdiction and that they had violated Section 5 of the Act by imposing ethical restrictions that restrained physicians from competing through truthful advertising and solicitation, and through contractual arrangements with health care delivery organizations and with non-physicians (Pet. App. 37a-312a).[1] The ALJ found (*id.* at 249a) that petitioners' actions had created

> a formidable impediment to competition in the delivery of health care services by physicians in this country. That barrier has served to deprive consumers of the free flow of information about the availability of health care services, to deter the offering of innovative forms of health care and to stifle the rise of almost every type of health care delivery that could potentially pose a threat to the income of fee-for-service physicians in private practice. The costs to the public in terms of less expensive or even,

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[1] We invite the Court's attention to the ALJ's decision, which painstakingly details the voluminous evidence relating to the merits of the complaint against petitioners, as well as the jurisdictional and remedial questions that are before this Court.

perhaps, more improved forms of medical services are great.

The Commission sustained the ALJ's findings and entered an appropriate cease-and-desist order in October 1979 (Pet. App. 312a-373a). The court of appeals modified and enforced the Commission's order (*id.* at 2a-31a).

A. The AMA Federation And Its Activities

The American Medical Association (AMA) is the world's largest medical and professional association. It is a not-for-profit non-share corporation organized as a federation composed of constituent state medical societies, such as petitioner Connecticut State Medical Society (CSMS). The constituent societies, in turn, are made up of local component societies, often county-wide, exemplified by petitioner New Haven County Medical Association (NHCMA). A physician must belong to a local society in order to join a constituent state society, and must belong to a constituent state society in order to become a member of AMA. Most members of AMA and its affiliates are engaged in traditional fee-for-service practice for profit (Pet. App. 41a-42a, 258a). In 1978, 60% of all American doctors, 75% of all office practitioners, and 80% of all board-certified practitioners were AMA members (*id.* at 40a-42a).[2]

AMA and its component and constituent societies have long engaged in a wide variety of educational, scientific and political endeavors (Pet. App. 47a-72a). At the same time, AMA has also promoted and served the entrepreneurial and commercial interests of its members (*id.* at 73a-95a). One of the purposes for which AMA was founded in 1847 was to "promot[e] the usefulness, honor and interests of the medical profession" (*id.* at 73a, 318a). AMA's articles of incorporation, as amended in 1902, stated that one of the principal objects of the Association was "safeguarding the material interests of

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[2] In 1975, 81.6% of Connecticut's 5,469 physicians were members of CSMS, and 71% of New Haven County's 1,660 physicians were members of NHCMA (Pet. App. 44a-45a).

the medical profession" (*id.* at 73a, 318a). Throughout its history, AMA, together with its federated affiliates, has devoted a substantial portion of its activities to this end (*id.* at 73a-133a, 253a-266a, 314a-325a).[3] In promoting membership, AMA has cited a long list of tangible pecuniary benefits it confers on its members (see, *e.g.*, *id.* at 75a). These include sponsorship of retirement funds for members, provision of "management information and guides to increase the productivity and profitability of [medical] practice," and organizing resistance to legislative proposals to control "physician fees," regulate medical practice, and grant aid to competitive providers of health care (*ibid.*). AMA claims that 41.5% of its dues revenues goes to assisting the physician and his practice, strengthening organized medicine, and representing the profession (*id.* at 261a-262a). AMA repeatedly advises its members that it operates to protect and foster their interests (*id.* at 73a), and the record clearly substantiates that assertion.

For example, AMA furnishes its members with practical business assistance, including advice on the financial aspects of managing a practice and legal counseling on such matters as taxes, sales of medical practices, and methods of avoiding unnecessary rental expenses (Pet. App. 91a-93a). Similarly, it conducts business research for its membership on the costs of doing business and the adjustment of fee schedules (*id.* at 90a). It also operates the nation's largest physicians' placement service (*id.* at 93a), and seeks pay increases for government-employed physicians (*id.* at 74a). AMA has promoted the pecuniary interests of its members in dealings with third-party payers by such actions as intervening with commercial insurers to "improve" their methods of informing subscribers when physician charges exceed prevailing fee levels, and by working to assure that Blue

[3] See also J.A. 165-190; Comment, *The American Medical Association: Power, Purpose, and Politics in Organized Medicine*, 63 Yale L.J. 938 (1954); Rayack, *Professional Power and American Medicine* (1967); Berlant, *Profession and Monopoly: A Study of the History of Medicine in the United States and Great Britain* (1975).

Shield plan benefit allowances are "fair" to physicians (*id.* at 85a-86a).[4] It also has made extensive efforts to assure that physicians providing services under Medicare are paid their "usual, customary and reasonable" fees (*id.* at 86a). AMA's Department of Negotiations teaches negotiating skills to help physicians obtain lower malpractice insurance premiums and a higher return for their services from insurance carriers (*id.* at 91a). AMA also supports doctors on hospital staffs by assisting them to "pursue their economic objectives" during disputes with hospital administrators (*id.* at 87a). In 1975, in response to high medical malpractice insurance premiums, AMA established a reinsurance company in order to reduce malpractice premiums and to make liability insurance available to physicians at a lower cost (*id.* at 89a). Since 1963, AMA has sponsored a retirement plan to enable its members to take advantage of the tax deductions and other benefits of the Keogh Act; in 1976, the plan had $140 million in assets (*id.* at 93a). In addition, AMA recently established a tax-exempt income fund for member physicians (*ibid.*).

AMA has acted to protect the profits of its member physicians by instituting litigation challenging government regulatory policies, including federally-imposed price controls on physicians' fees and federal utilization review programs designed to limit federal reimbursement for unnecessary surgery (Pet. App. 88a-89a). Furthermore, the Association has engaged extensively in public relations activities aimed at enhancing the public image of the medical profession (*id.* at 90a-91a). In 1977 alone, AMA spent approximately $3 million on its public relations program (*id.* at 90a).

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[4] AMA was instrumental in the creation and development of the nationwide network of Blue Shield plans that pay for physician services (Pet. App. 85a). It also helped to develop policies governing "physician reimbursement levels" of Blue Shield plans (*ibid.*). AMA has backed these physician payment plans as "the economic arm of the medical profession" (*ibid.*).

In addition, AMA has actively sought to influence government actions that might affect the pecuniary interests of its members or change the traditional system of fee-for-service practice—a system under which physicians have achieved the highest incomes of any profession (Pet. App. 79a). Thus, AMA's lobbying efforts contributed substantially to passage and amendment of the Keogh Act, which created substantial tax benefits for self-employed individuals, including the bulk of AMA's members (*id.* at 80a).[5] AMA engaged in extensive lobbying efforts against proposals to impose price controls on physicians' fees (*id.* at 77a-78a). It also lobbied heavily against proposed legislation intended to establish a national health insurance program that would provide for physician reimbursement on a basis other than the traditional fee-for-service basis (*id.* at 78a-79a). AMA opposed the initial enactment of the Medicare Program, and, in 1974, it lobbied against a proposed amendment to the Medicare statute that would have permitted participating physicians to accept payment according to a published fee schedule. In the AMA's view, unless such legislation was amended to require state medical society approval for each fee schedule, the resulting "ceiling on physician charges" would not have accorded with physicians' usual and customary charges (*id.* at 78a). In 1972, AMA opposed the initial passage of the Professional Standards Review Organization Act, which conditions Medicare payments to physicians on findings by a review panel that the services rendered are medically necessary and performed in the least expensive manner (*id.* at 82a). Similarly, AMA has opposed legislation relating to health maintenance organizations, which are prepaid, comprehensive health care delivery systems that AMA has recognized "pose[] some threat to private practitioners" (*id.* at 79a-80a). AMA also has lobbied to exclude the services of certain competing non-physician

[5] AMA reminds its members that each year they can save up to six times their annual AMA dues under the Keogh Act legislation which it claims that AMA "secured" (Pet. App. 80a).

health care professionals from federal health program coverage (*id.* at 82a). At the state level, AMA led an extensive nationwide lobbying campaign in 1975 for malpractice insurance legislation designed to stabilize premiums and ensure coverage of physicians (*id.* at 80a-81a). It also has campaigned to obtain recognition of physician use of "relative value" studies on fees, which purportedly "are useful in preventing inequities and economic injustice to physicians" (*id.* at 81a).

Moreover, AMA's long-standing and pervasive ethical restrictions on physician advertising, solicitation of patients, and contractual arrangements—the subjects of the Commission's cease-and-desist order in this case—have effectively insulated physicians from competition and have conferred substantial economic benefits on AMA members. The continuing effort of AMA to serve the pecuniary interests of its members in these areas is discussed in detail on pages 8-23, *infra*.

In light of AMA's numerous activities promoting the pecuniary interests of its members, the Association is classified, for federal income tax purposes, as a "business league" under Section 501(c)(6) of the Internal Revenue Code of 1954 (26 U.S.C.), rather than as a charitable organization under Section 501(c)(3) of the Code (Pet. App. 94a-95a). The Internal Revenue Regulations define a business league as

> an association of persons having some common business interest, the purpose of which is to promote such interest and not to engage in a regular business of a kind ordinarily carried on for profit. It is an organization of the same general class as a chamber of commerce or board of trade. * * *

26 C.F.R. 1.501(c)(6)-1.[6]

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[6] Like AMA, the Connecticut petitioners also have engaged in the promotion of their members' economic interests by such means as political lobbying, sponsorship of insurance programs, and deal-

B. AMA's Ethical Restrictions on Advertising and Contract Practice

1. *Sources and implementation of AMA's ethical requirements*

In 1957, AMA adopted the *Principles of Medical Ethics*, a concise codification of the basic ethical principles relating to the medical profession that were first promulgated by the AMA in 1847 (Pet. App. 133a). Enforcement of these ethical principles has been a significant function of AMA since its inception.

The *Principles of Medical Ethics* remained unchanged from 1957 until 1980, and consisted of a preamble and 10 short paragraphs (see Pet. App. 5a-6a n.1). The AMA Judicial Council, a five-member committee of AMA's House of Delegates,[7] issues official interpretations of the *Principles*.[8] Many of its statements are incorporated into the *Judicial Council Opinions and Reports*

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ings with third-party payers in which they opposed policies that would compensate physicians at rates below their "usual" fees (Pet. App. 117a-124a, 128a-133a). For example, both CSMS and NHCMA have encouraged the creation of medical foundations, which serve as negotiating agents for contracting physicians in all matters concerning third-party payments to physicians; such foundations provide a means by which fee-for-service physicians can confront the competitive threat posed by health maintenance organizations (*id.* at 119a-120a, 128a-130a). The Connecticut petitioners were involved in the promulgation of "relative value guides," which contain a detailed coding of relative values for different medical procedures; these guides are used by physicians in setting their fees and by third-party payers in physician reimbursement decisions (*id.* at 117a-118a, 130a-131a). The Connecticut petitioners have the same tax status as AMA under Section 501(c)(6) of the Internal Revenue Code of 1954 (26 U.S.C.) (*id.* at 124a, 133a).

[7] AMA is governed by a House of Delegates that comprises the representatives of its constituent societies. The House of Delegates is empowered to amend AMA's Constitution, By-laws and *Principles of Medical Ethics*, and to elect the Judicial Council (Pet. App. 42a-44a, 313a).

[8] Unless otherwise noted, references in this brief to the *Principles* are to the 1957 version.

(*"Opinions and Reports"*). At the time the administrative complaint was filed in this case, the governing interpretations of the *Principles* were contained in the 1971 version of the *Opinions and Reports* (*id.* at 134a). AMA also had issued a 1974 *Report on Physician-Hospital Relations* (containing AMA ethical restrictions on physicians' contractual arrangements), a 1966 "Guidelines for Telephone Directory Listings," and a 1974 Opinion on community professional directories, all of which were approved by AMA's House of Delegates (*id.* at 135a, 195a, 213a).[9]

In addition to distributing these documents to members and others, AMA advises local societies and members with respect both to general inquiries and to questions concerning the application of ethical principles in specific circumstances. It acts as a clearinghouse by conveying complaints and inquiries to its appropriate affiliate, often after indicating AMA's position on the particular question (see Pet. App. 135a-139a, 328a-329a), and by conveying ethics positions of local societies to one another (see *id.* at 136a).

The ethical requirements at issue in this case were implemented and enforced, both before and after the filing of the administrative complaint, throughout AMA's federated structure (Pet. App. 132a-139a, 328a-329a). The structure of AMA and its affiliates—combining component societies into constituent associations, and joining the whole into a single national organization—"is con-

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[9] A post-complaint statement on advertising and solicitation was issued by the Judicial Council in April 1976, and a revised edition of the *Opinions and Reports*, purportedly modifying the challenged standards, was issued in March 1977 (Pet. App. 244a-245a, 350a-352a). AMA issued a new version of the *Principles* in July 1980, while this case was under submission in the court of appeals (*id.* at 17a, 30a n.4). In January 1981, after the court of appeals had denied rehearing, the Judicial Council issued a statement on advertising under the 1980 *Principles* which permits nondeceptive advertising in the mass media (AMA Br. App. b-1). This statement is part of *The Current Opinions of the Judicial Council of the American Medical Association—1981*, published in March 1981 (AMA Br. 7-8).

ducive to development of system-wide consensus on ethical matters to which all members must adhere" (*id.* at 135a-136a, 328a-329a). The ethical requirements expressed in the *Principles of Medical Ethics* and the *Opinions and Reports* were widely distributed to medical societies, individual physicians, and medical students over the years (*id.* at 134a-135a). Under the Constitution and By-laws of AMA and of most of its affiliated medical societies, compliance with AMA's *Principles of Medical Ethics* is a requirement of continued membership (*id.* at 135a, 329a). Ethical principles adopted by local medical societies must be consistent with the Constitution and By-laws of AMA, and local societies are obligated to enforce AMA's ethical standards, including all of the interpretations contained in the *Opinions and Reports* (*id.* at 135a-136a, 328a-329a). Both Connecticut petitioners have adopted AMA's *Principles* to govern their members, and petitioner NHCMA's by-laws provide that its members may be expelled for violating AMA's *Principles* "as reflected in the [AMA] Judicial Council" (*id.* at 239a).

The AMA federation's collective application of its ethical standards is so effective that formal enforcement proceedings are rarely necessary. Advisory statements, warnings and informal reprimands from local societies are usually sufficient to enforce compliance. Few physicians who have joined AMA's constituent and component societies are willing to risk possible loss of medical society membership, because it is an important and valuable asset to their professional reputation, status and livelihood (Pet. App. 138a-139a). Ethical condemnation can result in professional embarrassment and disgrace, loss of referrals and other patronage, deprivation of malpractice insurance, the withholding of claims reimbursement by health insurance carriers, possible loss of hospital staff privileges, and denial of speaker and exhibitor status at professional society meetings (*id.* at 139a). In addition, physicians have substantial economic incentives to support the challenged ethical restrictions on entrepreneurial aspects of their profession, because such restraints

reduce competition and thus enhance income (*id.* at 94a, 269a-270a, 322a-323a, 339a-340a). As a result, informal warnings concerning AMA's ethical restrictions on solicitation, advertising and contract arrangements have deterred reputable physicians from repeating conduct that allegedly violated the restrictions (*id.* at 139a).

2. ***AMA's restrictions on solicitation and advertising***

Section 5 of the 1957 *Principles* provides that a physician "should not solicit patients" (Pet. App. 144a). In interpreting this provision, AMA's 1971 *Opinions and Reports* imposed an absolute prohibition on solicitation of patients or patronage, directly or indirectly, by individual physicians or by groups of physicians (*id.* at 144a-145a). AMA defined "solicitation" as any attempt "to seek professional patronage by oral, written or printed communications either directly or by an agent" (*id.* at 145a), and, according to a 1973 statement of a Judicial Council official, the prohibition against solicitation "of course, includes advertising" (*ibid.*).

The administrative record reflects that AMA's restrictions on solicitation and advertising were regularly invoked by constituent and component medical societies in the AMA federation (Pet. App. 147a-199a, 208a-221a).[10] In some instances, local medical societies acted to enforce the restrictions in response to complaints by physicians who expressed concern that their practice would be adversely affected as a consequence of advertising by competing physicians (*id.* at 269a-270a). The restrictions were applied to the dissemination of fee information (*id.* at 147a-150a), information regarding individual physicians' services (*id.* at 150a-151a), and information concerning alternative forms of medical care delivery, such as a physician house-call service (*id.* at 178a-180a) and a preventive medicine program offered to sophisticated industrial purchasers of medical services (*id.* at 152a-160a, 216a-219a). In addition, the restrictions were invoked to frustrate the marketing efforts of health main-

[10] Most examples in the record occurred between 1965 and September 1977, when adjudicative hearings began in this case.

tenance organizations and other prepaid group practice plans that posed a competitive threat to fee-for-service private practitioners (*id.* at 160a-168a).

AMA and its affiliates strictly limited the methods by which physicians could seek patronage. Restrictions were applied against truthful announcements, form letters and brochures (Pet. App. 168a-173a), newspaper advertising (*id.* at 173a-178a), radio and television advertising (*id.* at 178a-180a), and even unpaid publicity in the news media (*id.* at 180a-194a). AMA's ethical standards were invoked to restrict physician listings in the yellow pages (*id.* at 194a-199a) and in certain business and consumer directories (*id.* at 208a-216a). In effect, as the Commission found, "almost all advertising and promotional activity [was] proscribed, with a few narrowly circumscribed exceptions" (*id.* at 336a; see *id.* at 144a-147a, 283a).[11]

These restrictions on solicitation and advertising served to exacerbate the serious difficulties encountered by consumers in obtaining information necessary to make an intelligent choice among physicians and alternative forms of medical care delivery (Pet. App. 140a-144a, 342a-343a).[12]

3. *AMA's restrictions on physicians' contractual arrangements*

AMA's ethical restrictions on physicians' contractual arrangements focused on two principal subjects: contract

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[11] Similarly, the Connecticut petitioners sought to thwart truthful advertising and other patronage solicitation endeavors (Pet. App. 146a, 148a, 172a, 183a-184a, 190a-192a, 195a-197a). For example, petitioner CSMS's Executive Director sought to discourage Connecticut physicians from listing themselves in a local Chamber of Commerce program offering a 10% discount to senior citizens (*id.* at 148a). Petitioner NHCMA found that a letter from a radiology group seeking referrals from other physicians would be "faulted" if sent to physicians who had not previously referred patients to the group (*id.* at 172a).

[12] Fee information is particularly important because fees for basic services may vary by as much as 500% (Pet. App. 338a; J.A. 240-241).

practice of medicine, and physicians' arrangements with non-physicians.

a. AMA's ethical restrictions on the contract practice of medicine derive from interpretations of Section 6 of the *Principles of Medical Ethics* (Pet. App. 228a; J.A. 29). "Contract practice" is defined to mean (J.A. 42, 64):

> [T]he practice of medicine under an agreement between a physician or a group of physicians, as principals, or agents, and a corporation, organization, political subdivision or individual, whereby partial or full medical services are provided for a group or class of individuals on the basis of a fee schedule, or for a salary or for a fixed rate per capita.

Contract practice is different from the traditional practice of medicine in which an individual physician furnishes his services to an individual patient for a fee (Pet. App. 228a-229a, 231a-237a, 343a-350a, 348a-359a).

AMA's ethical restrictions relating to contract practice date back to 1869 (Pet. App. 229a). The restrictions at issue here were set forth in AMA's 1971 *Opinions and Reports* (Opinion 3 of Section 6) and restated in the 1974 *Report on Physician-Hospital Relations*, which was still widely distributed when trial began in September 1977 (*id.* at 228a-231a, 344a-347a, 358a; J.A. 5, 56-67). In January 1977, AMA cited the 1974 *Report* to the Commission as the best reflection of its current policies on the contract practice of medicine (J.A. 5).

The 1971 *Opinions and Reports* declared that an organization's contract with a physician for the delivery of medical services was "unfair and unethical" in the following situations (Pet. App. 344a; see *id.* at 228a; J.A. 43-44, 65):

> (1) When the compensation received is inadequate based on the usual fees paid for the same kind of service and class of people in the same community.
>
> (2) When the compensation is so low as to make it impossible for competent service to be rendered.

(3) When there is underbidding by physicians in order to secure the contract.

(4) When a reasonable degree of free choice of physicians is denied those cared for in a community where other competent physicians are readily available.

(5) When there is solicitation of patients directly or indirectly.

Under this formulation, adequacy of fees (item 1) was expressly tested against the physician's conformity to the usual and customary fees charged individual patients for comparable services by other physicians in the community engaged in traditional fee-for-service practice. Unduly low compensation (item 2) was measured by the same standard. The prohibition against underbidding by physicians in order to secure a contract (item 3) was addressed in a Judicial Council opinion, which, as the Commission noted, makes clear that "the only bidding activity permitted is a bid submitted in answer to a personal request when the physician knows that his or hers is the only quote requested" (Pet. App. 346a-347a). The requirement that any contract practice arrangement assure patients a "free choice" of physicians (item 4) was described by AMA as "expressly requir[ing] that any qualified licensed physician residing in the area in which the plan operates be allowed to participate" (*id.* at 235a). This restriction reflected AMA's disapproval of "closed-panel" medical plans, including health maintenance organizations, in which the patient is served only by the physicians participating in the plan, and which posed a competitive threat to individual practitioners (*id.* at 230a-231a, 347a).

The anticompetitive purpose underlying these restrictions was summarized in a Minority Statement to a 1932 Report of the Committee on the Costs of Medical Care, entitled "Medical Care for the American People" (*id.* at 345a, 230a-231a). That minority statement was endorsed by AMA's House of Delegates in 1933 as "expressive, in principle, of the collective opinion of the

medical profession" (*id.* at 231a, 345a). The statement explained that (*id.* at 345a):

> One of the strongest objections to industrial medical services, mutual benefit associations, so-called health in hospital associations, and other forms of contract practice, is that there has been found no means of preventing destructive competition between individuals or groups concerned with these movements. This injects a type of commercialism into medical practice which is harmful to the public and the medical professions and results in inferior quality of service.

The statement recognized "the advantage of group practice [only] under certain conditions, especially in communities where practically all of the physicians can be joined in one, or at most, two groups" (*ibid.*). It expressed a similar condemnation of voluntary insurance systems on the ground that they also lead to solicitation, destructive competition, demoralization of the profession and loss of personal physician-patient relationships (*ibid.*).

In addition to the above limitations on contract practice, the 1971 *Opinions and Reports* and the 1974 *Report on Physician-Hospital Relations* included a prohibition against departure from traditional fee-for-service compensation (Pet. App. 348a; see *id.* at 231a; J.A. 45; see also J.A. 46):

> A physician should not dispose of his professional attainments or services to any hospital, corporation or lay body by whatever name called or however organized under terms or conditions which permit the sale of the services of that physician by such agency for a fee.

As the Commission observed (Pet. App. 348a), "[t]he purpose of this restriction is manifest: to retain for the physician the full profit generated by his or her services and to preclude competition by group health plans, hospitals and other organizations not directly under the control of physicians."

b. The 1971 *Opinions and Reports* described as unethical contractual arrangements between physicians and

non-physicians involving the sharing of income from professional services (Pet. App. 241a-243a, 349a-350a). Under this standard, for example, it was considered unethical for a psychiatrist to enter into a partnership agreement with a psychologist. In accordance with this restriction, a physician could ethically join a professional association or corporation only if ownership remained solely in the hands of licensed physicians (*id.* at 241a).

c. The most notorious application of AMA's contract practice restrictions resulted in the criminal conviction of AMA and the Medical Society of the District of Columbia for violating the Sherman Act by attempting to restrain the development of the Group Health Association (a health maintenance organization) through use of boycotts and other coercive acts. *American Medical Association* v. *United States*, 130 F.2d 233, 238-240 n.23 (D.C. Cir. 1942), aff'd, 317 U.S. 519 (1943) (see Pet. App. 231a-232a).[18] This conviction did not deter AMA and its affiliates from continuing to implement the same underlying contract practice restrictions against similar proposed arrangements—with hospitals, group prepaid health plans, and industrial organizations—under which physicians would be employed on terms other than traditional fee-for-service practice (*id.* at 232a-241a).

For example, in 1965 AMA advised a state medical association that a physician could not ethically compete with other physicians through competitive bidding for an employment contract to perform physical examinations (Pet. App. 232a-233a). It also condemned, as a "classic example of a contract practice," an arrangement under which a corporate plantation sought to collect Medicare reimbursement for medical services provided to the plantation's farmworkers and retirees by the plantation's salaried physicians (*id.* at 233a). Following issuance of the 1971 *Opinions and Reports*, AMA declared unethical a plan by Manpower, a large temporary help service, to

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[18] The ethical provisions involved in that case were subsequently incorporated into the provisions of the 1971 *Opinions and Reports* that are at issue here (Pet. App. 282a).

hire physicians on a contract basis to cover hospital emergency rooms and adult health clinics (*id.* at 236a). The Association also condemned an arrangement whereby an internist was paid a fixed stipend by a hospital to direct an arthritis treatment clinic that collected fees from the patients (*id.* at 236a-237a). In another instance, AMA condemned as unethical a proposal under which a physician contemplating employment with a medical clinic in Chicago planned to assign his fees to the clinic in return for hourly compensation (*id.* at 237a).[14] As recently as June 1974, the AMA Judicial Council distributed a model physician-hospital contract requiring that professional fees be based upon traditional independent practice and "conform generally with those customarily charged in the locality and nearby localities for comparable services" (*id.* at 234a-235a).[15]

Similarly, in the period between 1970 and 1975, AMA and its affiliates invoked the ethical restriction on contractual arrangements between physicians and other health care professionals, expressing disapproval of income-sharing arrangements between physicans and physicians' assistants, physical therapists, clinical psychologists and audiologists (Pet. App. 241a-243a).

4. ***AMA's post-complaint ethics interpretations and its continued application of the challenged ethical restrictions***

In April 1976, AMA's Judicial Council issued a statement on physician advertising and solicitation (Pet. App. 379a-381a), which was later incorporated in part into a revised edition of the *Opinions and Reports* issued in March 1977 (*id.* at 366a-368a). As noted above, the prior prohibitions on advertising had been based on Section 5 of the *Principles of Medical Ethics*, which provided

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[14] The record cites numerous instances in which state and local medical associations invoked AMA's ethical restrictions aimed at preserving separate direct billing of patients by physicians for particular services rendered in hospitals (Pet. App. 231a-241a).

[15] AMA offered no evidence that its distribution of this model contract has ceased.

that a physician "should not solicit patients." The 1976 statement "reaffirm[ed] the long-standing policy of the Judicial Council on advertising and solicitation by physicians," but recited that "[t]he Principles do not proscribe advertising; they proscribe the solicitation of patients" (*id.* at 379a).[16] The 1976 statement did not address AMA's specific restrictions on contract practice. Instead, it asserted that "[f]reedom of choice of physicians and free competition among physicians are prerequisites of optimal medical care" (*id.* at 381a), but warned that "[a] physician should not engage in practices for pecuniary gain that interfere with his medical judgment and skill or cause a deterioration of the quality of medical care" (*id.* at 380a-381a). Certain of these formulations had been used to justify the earlier restrictions on contract practice (*id.* at 343a-350a). The 1977 edition of the *Opinions and Reports* did introduce certain modifications relating to contract practice.[17] Despite the 1976 and 1977 revisions, however, no changes were made in the underlying *Principles of Medical Ethics.*

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[16] In the 1976 statement, advertising was defined as "the action of making information or intention known to the public" (Pet. App. 379a). Solicitation was defined as "the attempt to obtain patients by persuasion or influence, using statements or claims that (1) contain testimonials, (2) are intended or likely to create inflated or unjustified expectations of favorable results, (3) are self-laudatory and imply that the physician has skills superior to other physicians engaged in his field or specialty of practice, or (4) contain incorrect or incomplete facts, or representations or implications that are likely to cause the average person to misunderstand or be deceived" (*id.* at 380a).

[17] Paragraph 4.05 of the 1977 *Opinions and Reports* stated that "a physician may be employed by, or otherwise serve, a medical care plan without violating the Principles of Medical Ethics" (Pet. App. 368a). Paragraph 6.01 declared that a physician may ethically "provide medical services to members of a prepaid medical care plan or to members of a health maintenance organization which seeks members (or subscribers) through advertising its services, facilities, charges, or other non-professional aspects of its operation as long as such advertising does not identify, refer to, or make any qualitative judgment concerning any physician who provides service to the members or subscribers" (*ibid.*).

These interpretative revisions were issued in response to "changing legal considerations," and administrative agencies' consideration of physician advertising and solicitation which, in the view of the Judicial Council, had made some provisions in the 1971 edition of the *Opinions and Reports* "legally inappropriate" (Pet. App. 245a).[18] Upon issuing these revisions, however, AMA did not announce to its members or its numerous affiliated societies any revocation or disapproval of its prior ethical restrictions (*id.* at 247a-248a), nor did it advise its affiliates to reconsider their application of those ethical restrictions in particular situations in which the restrictions might produce an ongoing restraint on competition.[19] On the contrary, AMA continued distributing the 1971 *Opinions and Reports* for a number of months after the filing of the Commission's complaint in December 1975 (*id.* at 245a; see J.A. 7).

Moreover, both the 1976 statement on advertising and solicitation and the 1977 revision of the *Opinions and Reports* stated that "[l]ocal, state or specialty medical associations, as autonomous organizations, may have ethical restrictions on advertising, solicitation of patients, or other professional conduct that exceed the Principles of Medical Ethics" (Pet. App. 367a, 380a). This was highly significant because supplementary ethical principles imposed by state and local components of the AMA federa-

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[18] In September 1975, three months after this Court's decision in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), the Secretary of the Judicial Council wrote to a state medical society that a major revision of the profession's position on advertising was not "necessary or advisable" although an "updating" of the Judicial Council's prior opinions on advertising might be helpful (Pet. App. 244a). The Secretary added that any updating would generally uphold "reasonable restrictions" on advertising (*ibid.*).

[19] The administrative findings contain numerous examples of physicians and executives of health care organizations who, at the time of the administrative hearing in the fall of 1977, were still refraining from advertising or contacting industrial employers because of the perceived impact of AMA's restrictions (Pet. App. 156a-159a, 161a-163a, 165a-167a, 174a-176a).

tion were declared by AMA to be binding upon its members so long as the supplementary principles were not inconsistent with AMA's Constitution and By-laws (*id.* at 247a). Furthermore, AMA had declared it unethical for a physician to disregard "local custom," as determined by the local society (*ibid.*). The 1977 edition of the *Opinions and Reports* reinforced this requirement by cautioning physicians that it is unethical not to conform to the "customs and usages of the medical profession"—norms that AMA's own prior rules and constraints had fostered throughout the profession—or to engage in conduct that may reflect upon "the dignity of and respect for the medical profession" (*ibid.*).

There is no evidence in the record that AMA's federated affiliates rescinded any restrictions on advertising or contract practice in response to AMA's 1976 and 1977 revisions (Pet. App. 245a). Indeed, local societies continued to invoke or paraphrase AMA's long-standing restrictions on advertising after AMA's issuance of its 1976 statement. For example, in July 1976, the NHCMA Board of Censors met with a Connecticut opthalmologist who had been the subject of a newspaper article describing as "rare" and "unusual" an operation that he had performed (*id.* at 190a-191a). The Board referred to complaints from other opthalmologists in the area, and noted that they raised a question of unethical behavior and self-aggrandizement (*id.* at 191a). The opthalmologist stated that the publicity department of his hospital would handle future releases of information (*ibid.*). As a result of NHCMA's intimidating action, the opthalmologist became wary about communicating information to others (*ibid.*; see also *id.* at 366a).

In August 1976, the State Medical Society of Maryland published an ethical guide that included the *Principles of Medical Ethics* and stated, on the authority of AMA's Judicial Council, that professional notices should "not carry listings of fees or any other material not in keeping with the dignity of the medical profession" (*id.* at 149a). The ethical guide also cited the Judicial Council

in support of its policies that newspaper columns should be written only by physicians not in active practice (Pet. App. 182a), that the holding of an open house for the purpose of obtaining personal patronage was unethical (*id.* at 220a), and that it was unethical for physicians to list themselves in any bank credit card directory or to indicate in plaques outside their offices that they participate in credit card plans (*id.* at 220a-221a).

In July 1976, an industrial medical clinic in California offering a preventive medical program to local industrial corporations mailed an announcement concerning swine flu immunization services to a number of firms in the area. On the basis of previous admonitions from the local medical society, the clinic's physician-director had refrained from contacting companies through their personnel offices or other executives. In November 1976, acting on complaints lodged by competing physicians with respect to the immunization notice, the Santa Clara County Medical Society reprimanded the clinic's director for poor judgment, and warned that more severe action would follow "should the committee learn of your involvement in any future incidents even *suggestive* of solicitation" (Pet. App. 155a; emphasis in original). As of the time of the adjudicative hearings in this case, the medical clinic had reduced its marketing activities and had largely curtailed its in-plant consultative activities (*id.* at 156a).

In February 1977, the Multnomah County Medical Society in Portland, Oregon, issued a warning that it was unethical for a physician, clinic, group or professional corporation to use a bold-face listing in the yellow pages or white pages of the telephone directory. The warning was based on AMA's prohibition of solicitation as interpreted in the 1971 *Opinions and Reports* (Pet. App. 197a). Similarly, a former President of the Maricopa County Medical Society testified at the adjudicative hearing in 1978 that the society did not permit physicians to advertise even truthful factual information in the newspapers (J.A. 400; Pet. App. 177a, 245a).

Local medical societies also continued to condemn contractual arrangements that departed from traditional fee-for-service practice. In June 1977, an insurance carrier controlled by the Florida Medical Association denied malpractice insurance to two physicians employed under a fixed salary contract by a Florida health maintenance organization. The rejection followed the state association's declaration, on the basis of AMA's ethical standards, that the physicians' employment contracts were unethical (Pet. App. 238a-239a). In April 1977, the Michigan Psychiatric Society concluded, on the authority of Section 6 of the 1971 *Opinions and Reports*, that outpatient psychiatric clinics organized as professional corporations must be owned only by physicians; the Society announced that this standard would be enforced through peer review and ethics committees (*id.* at 243a).

AMA's own witnesses, who testified in May 1978, appeared to believe that the prior ethical restrictions on solicitation and advertising were still in effect (Pet. App. 245a-247a, 358a). Dr. Stone, a member of AMA's House of Delegates, was called to testify "exclusively about the AMA's position on advertising and solicitation by physicians" (*id.* at 246a); he stated that it would be appropriate for a medical society to discipline a physician (or an organization such as the Mayo Clinic) for sending announcement cards to the public or for truthfully advertising his services in the press because this constituted "solicitation" (J.A. 397-399). Similarly, Dr. Hunter, Chairman of the AMA's Board of Trustees, testified that AMA officials had stated publicly that advertising must be "tasteful" as well as factually correct, and that most state and local medical societies had accepted this position (J.A. 395-396). The Chairman of AMA's section on medical schools, Dr. Biering, stated that competition among physicians on the basis of price, quality and service is "inappropriate," and that physicians should not compete in any commercial sense (J.A. 392-393). Dr. Biering also testified that it is appropriate for a medical society to reprimand or expel

a member who has advertised in the newspapers in a truthful fashion but in "bad taste" (J.A. 391a-392a).[20]

C. The Proceedings Below

1. *Proceedings before the Commission*

Following the issuance of the administrative complaint in December 1975, petitioners denied the allegations against them[21] and contended that the Commission lacked jurisdiction over them under Section 4 of the FTC Act, asserting that, as professional associations, they were not "corporations" "organized to carry on business for [their] own profit or that of [their] members." The Commission required the parties to develop a factual record on this issue (Pet. App. 39a-40a).

a. Following extensive hearings,[22] the ALJ concluded, on the basis of detailed findings of fact, that petitioners

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[20] Physician publicity and announcements constituting "infractions of good taste" were disapproved under the 1971 *Opinions and Reports* (Pet. App. 246a).

[21] AMA's position on the merits changed as the case progressed. In its answer, AMA denied that it had engaged in most of the practices challenged in the complaint and denied that such practices adversely affected competition or deprived consumers of information pertinent to the selection of a physician (Complaint ¶¶ 6-9; AMA Answer ¶¶ 6-9 (filed Jan. 23, 1976)). At the adjudicative hearing stage, AMA took the position that its pre-complaint activities were lawful. It vigorously contested complaint counsel's demonstrations that the challenged restrictions had been applied by the AMA federation or that they had any adverse competitive effect, and it claimed that the precomplaint restrictions were not the result of a combination or conspiracy among AMA, its members, and its constituent and component societies, which it claimed were autonomous. AMA also asserted that its pre-complaint restrictions were justified under the rule of reason. In its defense, AMA called witnesses who testified that physician price advertising would not help consumers and that in general professional advertising is harmful to society (AMA Proposed Conclusions of Law (filed July 27, 1978) at 8, 120-21, 124; Pet. App. 278a; J.A. 265-272). After the ALJ's adverse fact findings against it, AMA ceased directly to defend the legality of the challenged restrictive practices (Pet. App. 328a).

[22] Hearings before the ALJ began on September 7, 1977, and concluded after 57 trial days on May 4, 1978. Some 77 witnesses testified and approximately 3000 exhibits were admitted into the record (Pet. App. 39a-40a).

were subject to the Commission's jurisdiction (Pet. App. 73a-133a, 253a-266a). On the merits, the ALJ determined that AMA and its constituent and component medical societies, including the Connecticut petitioners, had conspired to impose the challenged ethics restrictions and had restrained competition among physicians and health care organizations (*id* at 140a-243a, 268a-298a). In addition, the ALJ ruled that the challenged practices had continued up to the time of trial, and that AMA's post-complaint actions did not demonstrate either that the challenged practices had been abandoned and were unlikely to recur or that a finding of liability under Section 5 was otherwise inappropriate (*id.* at 243a-248a, 298a-300a).

b. The Commission agreed with the ALJ that petitioners were "corporations" subject to its jurisdiction under Section 5(a)(2) of the FTC Act. Despite their formal not-for-profit status, the Commission determined that petitioners in fact were "organized to carry on business for * * * [the] profit * * * of [their] members" within meaning of Section 4 of the FTC Act. The Commission reached that conclusion because the record clearly established that a substantial portion of petitioners' activities was designed to produce direct economic benefit for their members, over and above benefits incidental to petitioners' other professional activities (Pet. App. 314a-325a).

Turning to the merits, the Commission found an antitrust combination and conspiracy among petitioner AMA and its constituent associations and component societies, and among all three petitioners and their physician-members, to impose undue restrictions on advertising, solicitation and contract practice (Pet. App. 328a-334a). Applying the "rule of reason," the Commission found that the restraints on advertising and solicitation had substantial adverse effects on competition among health

care providers, and that the restraints had no reasonable relationship to legitimate procompetitive ends that might justify properly tailored ethical restrictions (Pet. App. 334a-343a). Similarly, it found that the restrictions on contract practice injured competition and were not reasonably related to the prevention of improper practices by physicians (Pet. App. 343a-350a).

The Commission rejected AMA's claims that it should give decisive weight to AMA's post-complaint revisions of its published ethical interpretations, and that there was no cognizable danger of recurrent violations (Pet. App. 350a-361a). After examining the 1977 revisions at length, the Commission found that the revisions themselves provided substantial evidence that violations might recur. In particular, the Commission noted the absence of an adequate disavowal of prior interpretations, the use of terminology linked to the past restrictions, the substantial ambiguities and equivocations in other terminology, and AMA's failure expressly to rescind or disavow the contract practice restrictions expressed in the 1974 *Report on Physician-Hospital Relations*.

The Commission entered an order (Pet. App. 368a-372a) barring AMA from interfering with physician advertising and solicitation when not false, deceptive or overreaching, and from interfering with consideration paid physicians and with other specified aspects of contract practice.[23]

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[23] The Commission substantially modified the ALJ's proposed order, which would have required petitioners to cease and desist from restricting advertising, solicitation and the specified contract practices of their members for at least two years. Thereafter, the proposed order would have permitted AMA, subject to the Commission's approval, to develop and disseminate ethical guidelines concerning advertising and solicitation. The ALJ also would have compelled AMA to require its affiliates to adhere to the order, on pain of disaffiliation (Pet. App. 307a-309a).

In contrast to the ALJ's proposal, the Commission's final cease and desist order applies only to AMA. Part I is directed toward restrictions on advertising and solicitation. It requires the Associ-

2. *The Opinion of the Court of Appeals*

The court of appeals unanimously held that the evidence in the record sustained the Commission's jurisdic-

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ation to cease and desist from restricting advertising of services, facilities, or prices by physicians or organizations with which physicians are affiliated; from restricting solicitation, through advertising, bidding, or other means, of patients, patronage, or contracts to supply physicians' services; and from inducing physicians and private medical organizations from taking the prohibited restrictive actions. Part I expressly permits dissemination by AMA of reasonable ethical guidelines concerning false and deceptive representations within the meaning of Section 5 of the Federal Trade Commission Act, as well as guidelines concerning in-person solicitation of individuals whose circumstances make them vulnerable to undue influence. The court of appeals subsequently modified this provision to permit AMA to adopt guidelines to prevent representations that "[AMA] reasonably believes" would be false or deceptive within the meaning of Section 5 (Pet. App. 20a).

Part II of the Commission's order is directed toward contract practice restrictions. It bars AMA from restricting or interfering with the consideration offered or provided for the sale, purchase or distribution of a physician's professional services; from restricting the operation of any entity offering physician services by means of statements concerning the ethical propriety of medical service arrangements that limit the patient's choice of a physician; from restricting, by such statements, participation by nonphysicians in the ownership or management of such organizations; and from inducing physicians or private organizations from taking the actions prohibited by Part II. At the Commission's request, the court of appeals modified this provision (Pet. App. 21a) to make clear that the prohibition against interference with consideration offered to physicians for their services was addressed only to contracts with any entity that offers physician services to the public, and did not include professional peer review of fee practices, which had not been at issue in the proceeding.

Part III of the order requires AMA to provide notice, opportunity for a hearing, and findings and conclusions, before taking disciplinary action against any person for violation of its ethical standards. Part IV requires AMA to give notice of the Commission's order to its members, constituents and components; to require, as a condition of affiliation, that its constituent and component organizations agree that they will adhere to the substantive requirements of Parts I, II, and III; and to disaffiliate for one year any such organization that engages in any act or practice forbidden by those provisions.

tional finding that petitioners' activities promoting the pecuniary interests of their members were sufficiently substantial to bring petitioners within the definition of the term "corporation" in Section 4 of the Act (Pet. App. 9a-10a, 23a-25a). On the merits, the court concluded that substantial evidence supported the Commission's findings that the ethical restraints imposed by petitioners had an anticompetitive purpose and effect (*id.* at 12a-14a). The court also held that the Commission properly had found AMA's post-complaint revisions insufficient, because it was "not clear that the 1977 revisions rescinded prior ethical standards" (*id.* at 16a). Accordingly, the court ruled that the Commission properly had exercised its discretion by carefully considering the changes and rationally assessing their significance before concluding that a cease-and-desist order was warranted (*id.* at 17a).[24]

Judge Mansfield dissented in part. While agreeing with the majority that petitioners substantially serve the business interests of their members and therefore are within the Commission's jurisdiction (Pet. App. 23a-25a), he concluded that the evidence did not support a finding of liability and did not establish that violations were likely to recur (*id.* at 26a-31a). His conclusions rested on his disagreement with the Commission's assessment of the effect of AMA's post-complaint changes.

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[24] The court noted (Pet. App. 17a) the adoption, in July 1980, of a new version of the *Principles of Medical Ethics* (see *id.* at 30a n.4), which removed the earlier ban on "solicitation." It found, however, that the language of the 1980 *Principles* was general and imprecise, that the prior written interpretations of the 1957 *Principles* remained in effect, and that, in the absence in the record of any interpretation of the 1980 *Principles*, the Commission's order should stand (*id.* at 17a-18a).

INTRODUCTION AND SUMMARY OF ARGUMENT

As the spokesman for the medical profession, AMA occupies a central position in one of the largest and fastest growing sectors of the nation's economy—the health care industry. Measured in terms of employment, the health care industry is the second largest in the nation. Halper, *The Health Care Industry and the Antitrust Laws: Collision Course?*, 49 Antitrust L.J., 17, 18 (1980). Moreover, from 1975 to 1978, the annual increase in expenditures for medical care exceeded that for any other category in the Consumer Price Index other than food. U.S. Dep't of Health and Human Services (Pub. Health Service Pub. No. 81-1232), *Health United States: 1980* at 278 (1981). In 1980, health care expenditures in this country exceeded $247 billion, or 9.4% of the Gross National Product. Gibson & Waldo, *National Health Care Expenditures, 1980*, 3 Health Care Financing Rev. 1 (Sept. 1981). This reflected a dramatic increase from 1970, when total expenditures were $75 billion, or 7.5% of the GNP. *Id.* at 18 (Table 1). Physician services account directly for 19% of total health care expenditures; physicians also greatly influence expenditures for hospital services, nursing home care, drugs, and medical devices.

These figures only serve to highlight the obvious. The professional activities of thousands of physicians, coordinated by their national association and local federated societies, have a substantial "business aspect" (*Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 788 (1975)). Thus, in the modern world, it cannot be denied that the actions of physicians play an important part in commercial intercourse, and that anticompetitive restraints, executed by physicians on a national scale, impose a serious burden on the entire economy.

The record before the Commission demonstrates that for more than a century, competition in the health care industry was severely curtailed as a result of guild-like restrictions imposed on physicians by AMA and its federated affiliates. The Commission's order in this case

seeks to remedy AMA's long-standing restrictions on physician advertising and solicitation, and on the contract practice of medicine. Those restrictions were aimed at preserving traditional fee-for-service medical practice "as the dominant mode of medical care delivery * * *, a system under which physicians have [achieved] the highest income of any profession" (Pet. App. 79a).

Petitioners argue that the Commission lacked jurisdiction over them because of their status as not-for-profit professional associations. They also urge that the Commission's cease and desist order should not stand because they allegedly have modified their prior restrictive practices. We submit that petitioners' arguments simply ignore reality. In fact, AMA and its affiliates are a major force in the nation's economy and have exercised their power in substantial part to enhance the profitability of medical practice. And as the evidence before the Commission clearly established, a remedial order is needed to cure the effects of past violations and to guard against their recurrence.

The jurisdictional question in this case turns on whether non-profit professional associations that engage in substantial activities for the pecuniary benefit of their members are "corporations," which the FTC Act defines to include associations "organized to carry on business for [the] profit * * * of [their] members." Both the language and legislative history of the Act confirm—and petitioners concede—that Congress intended the Commission to regulate the activities of trade associations, which, while they may be organized as non-profit entities, substantially promote their members' economic interests. It follows that an organization of entrepeneur professionals, like any other association of entrepeneurs, is subject to the Commission's jurisdiction to the extent that it substantially advances the profit-making activities of its members. Under this test, the Commission and the court of appeals correctly concluded that petitioners are subject to the coverage of the FTC Act.

Moreover, there is no merit to the claim that a cease and desist order is unnecessary because of petitioners'

present refusal to defend their prior behavior or because of their limited efforts to modify that behavior after a complaint was filed against them. In fact, petitioners' long history of illegal behavior strongly supports the need for a remedy to reverse the effects of the restraints of trade they have imposed. And although petitioners are now quick to admit that their past conduct was unlawful, they have not been so quick to mitigate the effects of their past violations. The Commission's remedial order does what petitioners themselves have been unwilling to do. It dissipates the effects of past violations and protects the public against their repetition.

ARGUMENT

I. THE FEDERAL TRADE COMMISSION PROPERLY EXERCISED JURISDICTION OVER THE AMA FEDERATION PURSUANT TO SECTIONS 4 AND 5 OF THE FTC ACT

Section 5(a)(2) of the FTC Act, 15 U.S.C. 45(a)(2), empowers the Federal Trade Commission to prevent "persons, partnerships, or corporations" (with exceptions not here relevant) from engaging in unfair methods of competition and unfair or deceptive acts and practices in or affecting commerce. The term "corporation" is defined broadly in Section 4 of the Act, 15 U.S.C. 44, to include "any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, which is organized to carry on business for its own profit or that of its members."

In this case, the Commission held that its jurisdiction extended to " 'non-profit organizations whose activities engender a pecuniary benefit to its members if that activity is a substantial part of the total activities of the organization, rather than merely incidental to some non-commercial activity' " (Pet. App. 315a). Relying on the ALJ's detailed factual findings (*id.* at 73a-105a, 117a-124a, 128a-133a), the Commission agreed with the ALJ's conclusion (*id.* at 253a-266a) that AMA and its affiliates

satisfied this test, and thus were subject to the Commission's jurisdiction as "corporations" within the meaning of Section 4 of the Act (*id.* at 314a-325a). The court of appeals unanimously upheld that determination (*id.* at 9a-10a, 23a-25a).[25] As we demonstrate below, the rulings of the Commission and the court of appeals rest on a correct construction of the statute and are supported by substantial evidence.

A. The Commission Has Jurisdiction Over A Not-For-Profit Association That Engages In A Substantial Amount Of Activity For The Pecuniary Benefit Of Its Members

1. *The plain language of Section 4 supports the substantiality test*

The jurisdictional question in this case turns on whether petitioners are "organized to carry on business for [the] profit of [their] members." It is undisputed that Congress did not intend to permit the Commission to assert jurisdiction over " 'any and all nonprofit corporations regardless of their purposes and activities' " (Pet. App. 316a, quoting from *Community Blood Bank of the Kansas City Area, Inc.* v. *FTC*, 405 F.2d 1011, 1018 (8th Cir. 1969)). However, it is equally well

[25] Judge Mansfield's separate opinion on this point (Pet. App. 23a-25a) does not manifest any significant difference over the proper interpretation of Section 4. The test adopted by Judge Mansfield is the same test that the Commission applied and the majority of the court of appeals approved, *i.e.*, "whether the association engages in a substantial amount of activity for the pecuniary gain of its members. Where its activities designed to help its members' economic status are purely incidental or *de minimus* in comparison with the organization's nonremunerative activities, jurisdiction does not exist" (Pet. App. 24a). The majority's observation (*id.* at 9a) that the business aspects of petitioners' activities are within the scope of the Act "even if they are considered secondary to the charitable and social aspects of their work," simply restates the Commission's conclusion (*id.* at 317a) that profit-promoting activities need not be "dominant" so long as they are substantial and not merely incidental—a view shared by Judge Mansfield (*id.* at 24a-25a).

settled that "[t]he language of the act affords no support for the thought that individuals, partnerships and corporations can escape restraint, under the act, from combining in the use of unfair methods of competition, merely because they employ as a medium therefor an unincorporated voluntary association, without capital and not itself engaged in commercial business." *National Harness Manufacturers' Association* v. *FTC*, 268 F. 705, 709 (6th Cir. 1920). Thus, as the Commission held (Pet. App. 316a), "the 'mere form' of incorporation is not dispositive; it is the 'reality' of a respondent being in law and in fact a charitable organization (the determination of which must necessarily be conducted on an ad hoc basis) that places it beyond the Commission's reach." Under this standard, if a substantial portion of an organization's activities is directed toward enhancing the profits of its members, and if those activities are more than incidental in nature, then the "reality" is that the organization is carrying on business for the profit of its members.

Petitioners insist, however, that before an organization may be classified as a "corporation" under Section 4, three distinct requirements must be met: (1) the ostensible not-for-profit entity must in fact be organized to "carry on business" through trade or manufacturing activity (AMA Br. 22); (2) it must "accumulate gain for distribution to shareholders or members" (AMA Br. 24); and (3) it must be "predominantly devoted to" commercial rather than eleemosynary pursuits (AMA Br. 27). But none of those requirements appears in the language of Section 4. And, if the words of the statute are to be given their "ordinary meaning" (*Perrin* v. *United States*, 444 U.S. 37, 42 (1979)), such requirements should not be superimposed. See *United States* v. *Naftalin*, 441 U.S. 768, 772-777 (1979).

a. There is no merit to petitioners' claim that the statutory phrase "carry on business" refers only to trade or manufacturing. At the time the FTC Act was enacted, the common, ordinary meaning of the term "busi-

ness" was "that which busies or engages time, attention or labor as a principal serious concern or interest." *Webster's New International Dictionary* 296 (unabridged ed. 1913). Although "business" also was defined to *include* trade activity, the dictionary definitions are not so limited and are generic in scope. *Ibid.* See also Murray, *New English Dictionary* 1205-1206 (1888); 1 *Bouvier's Law Dictionary and Concise Encyclopedia* 406 (Rawle 3d rev. ed. 1914); *Oxford English Dictionary* 1205-1206 (1933). Moreover, petitioners' construction is refuted by the statutory context in which the term "business" appears. Had Congress meant "business" to be given a narrow construction limited to traditional "trade" or "manufacture," the additional words "for * * * profit" in Section 4 would have been mere surplusage.[26]

In any event, the AMA does in fact engage in "business" even in the most limited sense of the word. The ALJ found that in 1976, AMA had projected annual revenues totaling more than $55 million and total projected assets of more than $47 million (Pet. App. 41a). The record shows that AMA obtains income from sales of its publications and advertisements in those publications (J.A. 144-146), dues and assessments (J.A. 139-141), investments and insurance (J.A. 147, 149), and other related sources (J.A. 142-143, 150). These business activities, and the financial returns which they produce, are, in fact, used in substantial measure to promote the profit-making activities of physician-members. Thus, applying the literal language of the statute, it is plain

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[26] Further evidence that the term "business" is not limited to traditional manufacturing or mercantile endeavors is provided by this Court's decision in *American Medical Association* v. *United States*, *supra*, which held that the Group Health Association, "a nonprofit corporation organized by Government employees to provide medical care and hospitalization on a risk-sharing prepayment basis" (317 U.S. at 526), was "engaged in business or trade" (*id.* at 528) within the meaning of the Sherman Act. Moreover, as discussed more fully on pages 34, 38-40, *infra*, if petitioners' restrictive definition of the term "business" were accepted, it would strip the Commission of jurisdiction over trade associations, since those entities do not themselves engage in manufacturing or mercantile endeavors.

that AMA is engaged in "business" for the profit of its members.

b. Petitioners further claim that only profit-distributing entities are comprehended within Section 4. However, that assertion is plainly inconsistent with petitioners' recognition (Br. 26 n.20) that the statutory phrase "for its own profit or that of its members" was intended to bring non-profit trade associations within the Commission's jurisdiction. In numerous cases, this Court and the lower federal courts have treated trade associations as falling within the scope of the FTC Act even though such organizations do not make any direct distribution of "profit" to their members.[27] As the Commission correctly pointed out (Pet App. 316a-317a), petitioners' "effort to distinguish these cases on grounds that the entities involved were devoted primarily to enhancing the pecuniary benefit of their members implicitly recognizes that the degree of pecuniary benefit conferred is the fundamental issue, not whether the benefit is physically distributed." Thus, in *FTC* v. *National Commission on Egg Nutrition*, 517 F.2d 485, 488, (7th Cir. 1975), cert. denied, 426 U.S. 919 (1976), the Seventh Circuit observed that an organization can be found to be organized for the profit of its members "even though it pursues that profit indirectly." The court held that a non-profit association that claimed to promote public health through advertisements describing the nutritional value of eggs was subject to the Commission's jurisdiction because the association also sought to create a favorable business climate for its members. *Ibid.* In short, contrary to petitioners' claim, it is well established that "[p]rofit for the purpose of Section 4 * * * is not limited to dividends, gains or direct reward" distributed by an asso-

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[27] See, *e.g.*, *FTC* v. *Cement Institute*, 333 U.S. 683 (1948); *Millinery Creator's Guild, Inc.* v. *FTC*, 312 U.S. 469 (1941); *Fashion Originators' Guild* v. *FTC*, 312 U.S. 457 (1941); *FTC* v. *Pacific States Paper Trade Association*, 273 U.S. 52 (1927). See also *Standard Container Manufacturers' Association* v. *FTC*, 119 F.2d 262 (5th Cir. 1941); *California Lumbermen's Council* v. *FTC*, 115 F.2d 178 (9th Cir. 1940), cert. denied, 312 U.S. 709 (1941); *Chamber of Commerce* v. *FTC*, 13 F.2d 673 (8th Cir. 1926).

ciation to its members. *Ohio Christian College*, 80 F.T.C. 815, 848 (1972).

c. Petitioners' contention that Section 4 is limited to "corporations" whose activities are "predominantly" devoted to commercial activities is equally without merit. This argument erroneously assumes that an association's commercial and noncommercial activities can be segregated, quantified and weighed. The Commission found that this approach is not feasible (Pet. App. 95a-105a, 261a-262a, 323a-325a), and the court of appeals sustained that determination (*id.* at 9a-10a, 24a-25a). Moreover, the standard advocated by petitioners would permit an association of entrepreneurs to exempt itself from the FTC Act simply by manipulating the ratio of the association's profit-enhancing and eleemosynary activities.[28]

The FTC Act, which authorizes the Commission to prevent corporations from using unfair methods of competition and unfair or deceptive acts or practices, is concerned with the external impact of acts and practices on interstate commerce. Accordingly, an entity's eleemosynary activities, when carried on simultaneously with substantial profit-promoting activities, are irrelevant in determining the statute's application. When an association's profit-related activities are substantial and also involve conduct that is anticompetitive or harmful to consumers, there is no reason why the association should be immune from Commission scrutiny merely because it is organized in non-profit form and engages in certain eleemosynary activities. Cf. *Goldfarb* v. *Virginia State*

[28] Most associations of entrepreneurs are engaged in a variety of functions ranging from charitable, educational, or scientific activities to activities intended to promote their members' entrepreneurial interests. See the cases cited in note 27, *supra*. See also, *e.g.*, *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978); *Goldfarb* v. *Virginia State Bar*, *supra*; *American Medical Association* v. *United States*, *supra*. According to petitioners' theory, an entity engaged in price fixing could escape the Commission's jurisdiction if it devoted 49% of its budget to prescribing and monitoring cartel prices—so long as it devoted 51% of its budget to the publication of educational materials. See generally *Board of Governors of the Federal Reserve System* v. *Agnew*, 329 U.S. 44[illegible]6 (1947).

Bar, supra, 421 U.S. at 787; *National Harness Manufacturers' Association* v. *FTC, supra*, 268 F. at 709.

Petitioners' contrary interpretation finds no support in the relevant case law. *Community Blood Bank of the Kansas City Area, Inc.* v. *FTC, supra*, on which petitioners rely (Br. 24, 27), does not support the assertion that direct distribution of profits to members and predominance of commercial over eleemosynary goals are jurisdictional prerequisites. In that case, the Commission entered a cease and desist order against a non-profit hospital association and a non-profit community blood bank. *Community Blood Bank of Kansas City Area, Inc.*, 70 F.T.C. 728, 894, 974 (1966). It concluded that the two associations operated for their own "profit" within the meaning of Section 4 because they were in a position to use any excess of income over expenditures for self-perpetuation or expansion. 70 F.T.C. at 907-908. In reversing the Commission's ruling, the Eighth Circuit quoted approvingly from the dissenting opinion of Commissioner Elman, who noted that " '[t]here is no contention that any of the corporate respondents is a device or instrumentality of individuals or firms who seek monetary gain through the nonprofit corporation.' " 405 F.2d at 1019, quoting 70 F.T.C. at 950. Thus, the court in *Community Blood Bank* did not consider or address the issue presented in this case—*i.e.*, whether an association of professionals is organized for the profit of its members when the association's activities are directed, in substantial part, toward promoting its members' economic interests.

The court in *Community Blood Bank* declined to adopt an interpretation of Section 4 that would have embraced "any and all nonprofit corporations regardless of their objectives, motives and the results of their operations." 405 F.2d at 1015. The court concluded that Section 4 requires an ad hoc inquiry focusing on whether the organization engages in business for profit within the traditional meaning of that language. 405 F.2d at 1018. Under this test, a not-for-profit corporation that operates solely for charitable purposes and only incidentally gen-

erates profit for itself or its members is beyond the reach of Section 4. 405 F.2d at 1017-1018.[29] The Commission's ruling here is perfectly consistent with these standards. Its exhaustive examination of the totality of petitioners' functions revealed that petitioners were engaged not only in public service activities, but also in substantial activities designed to enhance the profits of their members, most of whom "are engaged in the profit motivated private practice of medicine" (Pet. App. 258a). See pages 43-46, *infra*.

2. ***The legislative history of Section 4 confirms that all "trade associations," including associations of entrepreneur professionals, are within the scope of the FTC Act***

The legislative history of the FTC Act clearly demonstrates that "Congress did not intend to provide a blanket exclusion of all non-profit corporations, for it was * * * aware that corporations ostensibly organized not-for-profit, such as trade associations, were merely vehicles through which a pecuniary profit could be realized for themselves or their members." *Community Blood Bank of the Kansas City Area, Inc.* v. *FTC*, *supra*, 405 F.2d at 1017. As originally approved by the House, the proposed legislation would have established a trade commission with limited powers to investigate and report on the activities of corporations in commerce.[30] The House

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[29] The Eighth Circuit held that the Commission lacked jurisdiction under that test because the funds of the blood bank and hospital associations never "inured to the benefit of any of their members" and were used "exclusively" for educational and charitable purposes. 405 F.2d at 1020. The court also noted that even the individual officers, directors, and employees of the particular associations involved "derived no personal profit, benefit or advantages in their individual occupations as [*e.g.*,] * * * doctors * * * from their participation in the activities of the community-wide blood bank program." *Id.* at 1021.

[30] The new commission was to succeed the Bureau of Corporations, which had been created when the Department of Commerce and Labor was established in 1903. Act of Feb. 14, 1903, ch. 552, Section 6, 32 Stat. 827-828. The 1903 Act had authorized investigations of "corporations" in commerce, but had not defined "corporations."

bill defined the term "corporation" to include "a body incorporated under law, and also joint stock associations and all other associations having shares of capital or capital stock or organized to carry on business with a view to profit." H.R. Conf. Rep. No. 1142, 63d Cong., 2d Sess. 11 (1914).[31] Unlike the House bill, the Senate version called for a regulatory body empowered to remedy, as well as investigate, unfair competition by persons, partnerships, or corporations. *Id.* at 16.[32] The definition of "corporation" in the Senate bill was similar to that in the House bill; it included joint stock and share capital associations "organized to carry on business for profit." Id. at 14.[33]

Two days after the bill passed the Senate, Commissioner Joseph E. Davies of the Bureau of Corporations wrote to Senator Newlands, expressing concern that the definition of corporations as it appeared in the Senate-passed bill would prevent the proposed commission from regulating trade associations, many of which were organized as not-for-profit entities. See *Community*

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[31] Representative Covington, the sponsor of the House bill, stated that the definition of "corporation" was not intended "to create any exemptions for labor organizations or farmers' organizations, or any other sort of organizations that exist in the United States of America." 51 Cong. Rec. 8844 (1914).

[32] In extending the Commission's regulatory authority to persons and partnerships, the Senate rejected the plea of Senator Newlands, the sponsor of the original legislation in the Senate, that the jurisdiction of the Commission should be confined to traditional corporations and that associations of individuals should be exempted. 51 Cong. Rec. 13116 (1914).

[33] During the Senate Hearings, some witnesses had objected that the definition of "corporation" was too narrow because it would exclude various kinds of selling agencies, pools and trade associations that were not organized for profit and did not have shares of stock, and because it did not apply to labor unions and farmers cooperative organizations. *Interstate Trade: Hearings on Bills Relating to Trust Legislation Before the Senate Comm. on Interstate Commerce*, 63d Cong., 2d Sess. 127-129 (1914) (statement of Samuel Untermyer); *id.* at 192 (statement of Cornelius Lynde).

Blood Bank of the Kansas City Area, Inc. v. *FTC*, *supra*, 405 F.2d at 1017-1018. He observed that

> [a]s to some of the things done by these associations, no questions as to their propriety can be raised; on the other hand, these organizations invariably furnish the vehicle and the possible temptation to engage in practices that are improper. Many of these associations claim to be organized not for direct pecuniary profit for their members, but nevertheless do furnish convenient vehicles for common understandings looking to the limitation of output and the fixing of prices contrary to the law. The power of the commission ought certainly to be sufficiently broad to enable it to inquire into the transactions of such associations.

Trade Commission Bill: Letter From the Commissioner of Corporations to the Chairman of the Senate Comm. on Interstate Commerce, Transmitting Certain Suggestions Relative to the Bill (H.R. 15613) to Create a Federal Trade Commission, 63d Cong., 2d Sess. 3 (Comm. Print 1914). The conference thereafter amended the definition of corporation to include "any company or association incorporated, * * * without shares of capital stock, except partnerships, which is organized to carry on business for its own profit or that of its members." H. R. Conf. Rep. No. 1142, *supra*, at 3. Neither the Conference Report nor the subsequent debates discussed the expanded definition of "corporation".[34] However, the foregoing history clearly reinforces the literal language of the statute, which shows that Congress intended to grant the Commission jurisdiction over non-profit asso-

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[34] In presenting the Conference Report to the House, Representative Covington stated that Section 5 of the Act, which incorporates Section 4's definition of corporations, "embraces within [its] scope * * * every kind of person, natural or artificial, who may be engaged in interstate commerce." 51 Cong. Rec. 14928 (1914). This general statement highlights the intended breadth of the jurisdictional grant.

ciations that operate to enhance the profit-making activities of their members.[35]

b. Petitioners also argue (Br. 21) that the existence of an exemption in the FTC Act for professional associations is evidenced by the failure of the 95th Congress to enact legislation[36] amending Section 4 to confer on the Commission unqualified jurisdiction over "all individuals and organizations of any form," including nonprofit organizations with no commercial activities.[37] However, no inference about the meaning of the original enactment can be drawn from these unenacted proposals. The rejected amendments were intended not only to eliminate the detailed ad hoc inquiry required by *Community Blood Bank, supra,* but also to erase the statutory distinction between entities organized for the economic benefit of their members and those organized solely for charitable purposes. Thus, as the Commission observed (Pet. App. 318a), "the subject of congressional inaction is broader in scope than the point for which it is cited." In these circumstances, Congress's rejection of the legislation, and related expressions of opinion by individual congressmen about the meaning of the 1914 legislation, are entitled to little, if any, weight. See *American Trucking Associations* v. *Atchison, T. & S.F. Ry.*, 387 U.S. 397, 417-418 (1967); *United States*

[35] Petitioners point out (Br. 20, 23) that the legislative history of the FTC Act shows that Congress was concerned with the regulation of manufacturing corporations and other industrial businesses. But none of the statements cited by petitioners even indirectly supports the negative inference that Congress meant to *exclude* professional associations from the ambit of the Act. See *United States* v. *Turkette*, No. 80-808 (June 17, 1981), slip op. 14-15; *United States* v. *Naftalin*, 441 U.S. 768, 774-775 (1979); *United States* v. *Culbert*, 435 U.S. 371, 377 (1978). See also *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 592 (1980) ("In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark.").

[36] H.R. 3816 and S. 1288, 95th Cong., 1st Sess. (1977).

[37] H.R. Rep. No. 95-339, 95th Cong., 1st Sess. 53 (1977).

v. *Southwestern Cable Co.*, 392 U.S. 157, 170 (1968).[38] Indeed, it is well settled that an unsuccessful attempt by an agency to obtain legislative clarification of a general grant of jurisdiction is not evidence that the agency lacks the specific jurisdiction for which it seeks confirmation. *Ibid.* See also *FTC* v. *Dean Foods Co.*, 384 U.S. 597, 608-611 (1966); *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 47 (1950).[39]

c. Petitioners further assert (Br. 19) that, "[b]y limiting FTC jurisdiction to associations organized for profit while making all associations subject to the Sherman and Clayton Acts, Congress excluded nonprofit professional associations from FTC jurisdiction and gave federal courts that enforce the Sherman Act exclusive antitrust jurisdiction over such associations."[40] Peti-

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[38] Accord, *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 348-349 (1963); *United States* v. *Wise*, 370 U.S. 405, 411 (1962); *United States* v. *United Mine Workers*, 330 U.S. 258, 282 (1947).

[39] Nor was there any perceived need for Congress to enact new legislation to confirm jurisdiction in cases such as the present case. As the Commission explained to Congress, the court of appeals in *Community Blood Bank, supra*, "affirmed the Commission's jurisdiction over nonprofit corporations whose activities redound to the economic benefit of their shareholders or members * * *." *Federal Trade Commission Amendments of 1977 and Oversight: Hearings Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 1st Sess. 82 (1977) (Statement of FTC Chairman Collier).

[40] Petitioners' comparison of the definition of "corporation" in Section 4 of the FTC Act with the definition of "person" in the Sherman and Clayton Act (15 U.S.C. 7 and 12) completely misses the point. Unlike Section 4, the latter statutes literally include all associations organized under the laws of any state. This comparison shows only that the Commission's jurisdiction is not commensurate with that of federal courts under the antitrust laws—a point that is not in dispute.

Nor does the fact that the Clayton Act was enacted in the same session of Congress as the FTC Act provide any illumination. The two statutes were treated separately throughout the legislative process. The FTC Act was developed in the Commerce

tioners' leap from premise to conclusion falls fatally short. As this Court has observed, "the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act." *FTC* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392, 394 (1953). It would therefore have been remarkable for Congress to have created, sub silentio, an exemption from the FTC Act for one particular class of entrepreneurial associations when all such associations are subject to the very statutes that Congress sought to reinforce.

Petitioners nevertheless insist (Br. 22) that Congress must have intended to exclude professional associations because, when the FTC Act was passed in 1914, the professions "were simply not regarded as engaged in trade or business subject to the antitrust laws." But this Court in *Goldfarb* rejected a similar argument asserted by a professional association, which contended that the business activities of learned professions were not regarded as "trade or commerce" when the Sherman Act was enacted. 421 U.S. at 786-788. The Court noted that "[t]he nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act" (421 U.S. at 787), and emphasized that the association's members were engaged in commerce in the most common usage of that word: the exchange of a service for money (*id.* at 787-788). Given the comprehensive reach of the Sherman Act, the absence of any express exception for professional associations, and the heavy presumption against implicit exemptions from such a statute, the Court held that Congress intended to reach professional associations. The same analysis applies under the FTC Act, which was drawn in broad terms in order to meet the changing needs of a dynamic economy. See *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 239-244 (1972); see also *United States* v. *Southwestern Cable Co.*, *supra*, 392 U.S.

Committees of the Senate and House, whereas the Clayton Act evolved in the Judiciary Committees of both chambers. See 51 Cong. Rec. 11537 (1914) (remarks of Sens. Cummins and Newlands).

at 172-173. The FTC Act should not be frozen by reference to economic conditions in 1914 any more than the Sherman Act should be restricted to conditions in 1890. "This Court frequently has observed that a statute is not to be confined to the 'particular application[s] . . . contemplated by the legislators.'" *Diamond* v. *Chakrabarty*, 447 U.S. 303, 315 (1980), quoting *Barr* v. *United States*, 324 U.S. 83, 90 (1945). It follows that an association of entrepreneur-professionals, like any other association of entrepreneurs, is subject to the jurisdiction of the Commission to the extent that it substantially promotes the profit-making activities of its members.[41]

B. The Facts As Found By The Commission And Unanimously Sustained By The Court Of Appeals Establish That The AMA Federation Carries On Business In Substantial Part For The Profit Of Its Members

The detailed findings of the ALJ and the Commission show that the activities of physicians, no less than those of lawyers, engineers and members of other learned professions, have a "business aspect" properly subject to federal laws regulating anticompetitive practices. *Goldfarb* v. *Virginia State Bar*, *supra*, 421 U.S at 788. Accord, *National Society of Professional Engineers* v. *United States*, *supra*; see also *American Medical Association* v. *United States*, *supra*, 317 U.S. at 528. Doctors earn their livelihood through their profession by offering their services to patients in exchange

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[41] Petitioners' argument that the courts have exclusive jurisdiction over professional associations suffers from a further defect. Section 5 of the FTC Act was intended to remedy both conduct that injures competition and conduct that causes unfair or deceptive injury to consumers. Petitioners advance no reason why Congress would have intended to exempt professional associations from the latter aspect of the Commission's remedial responsibilities. The jurisdiction of federal courts under the Sherman Act is not parallel to that of the Commission under this unique aspect of the FTC Act. See *FTC* v. *Sperry & Hutchinson Co.*, *supra*, 405 U.S. at 239-244; *FTC* v. *R.F. Keppel & Bro., Inc.*, 291 U.S. 304, 309-314 (1934).

for money. "[T]he exchange of such service for money is 'commerce' in the most common usage of that word." *Goldfarb*, *supra*, 421 U.S. at 787-788. Doctors also must compete with each other, and with alternative modes of health care delivery, to attract patronage. Cf. *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 368-369 (1977); Halper, *The Health Care Industry and the Antitrust laws: Collision Course?*, *supra*, 49 Antitrust L.J. at 19-22. It is not surprising, therefore, that doctors have combined into professional associations for the purpose, *inter alia*, of enhancing their livelihood and, in the words of AMA's 1902 amendment to its articles of incorporation, "safeguarding the material interests of the medical profession" (Pet. App. 318a). Seventy five percent of all office practitioners in the United States are members of AMA (*id.* at 41a). As the ALJ found, "[m]ost of AMA's members are engaged in the profit motivated private practice of medicine," and AMA operates to protect, foster and serve its members' economic interests (*id.* at 258a). The findings, which we have summarized above in considerable detail (pages 3-7, *supra*), amply support AMA's own descriptions of the "remarkable range of tangible benefits and services" it confers on its membership (*id.* at 319a).

Although the concurrent findings of the Commission and the court of appeals clearly establish that "a significant part of [petitioners'] time and resources are devoted to obtaining, protecting and furthering the economic interest of their members" (Pet. App. 258a; see *id.* at 318a; *id.* at 9a-10a, 24a-25a), AMA nevertheless contends that any pecuniary benefit to its members is "incidental." This contention is based on evidence AMA presented to the Commission that purported to show that "65.5% of its budget is devoted to promoting science, education and the public health and that 25.8% is spent on administrative and organizational matters, common to all nonprofit associations" (AMA Br. 25). There is no merit to this contention. AMA is improperly seeking to relitigate in this Court factual issues resolved against it

in the tribunals below, which found that AMA's promotion of its members' entrepreneurial interests was substantial—not incidental—and that the evidence AMA cites in this Court is unreliable. The ALJ expressly found that, while the precise percentage of AMA's income devoted to the furtherance of the economic interest of its members could not be ascertained, a "substantial portion" of AMA's income was devoted to such activities (Pet. App. 261a). The ALJ also found that the budget analysis approach advanced by petitioners is "unreliable" (*id.* at 100a) and "is not appropriate to measure the degree to which AMA serves the economic interests of its members" (*id.* at 103a).[42] These factual findings were properly sustained by both the Commission and the court of appeals.

Accordingly, although AMA undoubtedly engages in scientific, educational, social, and charitable activities (Pet. App. 319a), a very significant proportion of its activities serves the entrepreneurial interests of its members, a fact confirmed by AMA's own tax status as a "business league" (see page 7, *supra*).[43] As Judge

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[42] The ALJ found that the principal budget analysis upon which AMA relies (J.A. 89-164) was seriously deficient because, *inter alia*, it was based on highly subjective judgments that attempted to compartmentalize activities as economically or non-economically oriented (Pet. App. 104a). Moreover, the report's comparison of AMA's budget with the budgets of hundreds of other associations also was flawed both because the response rate to the underlying questionnaires was only 20% and because the questionnaires were never audited (*id.* at 103a). The ALJ's findings concerning the defects in this report were based on an analysis (J.A. 165-190) submitted by Dr. Paul Feldstein, a professor in the School of Public Health and in the Department of Economics at the University of Michigan, who specializes in the economics of medical care (Pet. App. 95a-96a, 100a-105a).

[43] See generally *National Muffler Dealers Association* v. *United States*, 440 U.S. 472 (1979) (discussing the scope of the term "business league" under Section 501(c)(6) of the Internal Revenue Code of 1954). Of course, there is nothing wrong with an organization's effort to promote the profits of its members through lawful means. However, an organization so engaged cannot claim immunity from the FTC Act.

Mansfield observed, in words applicable to the entire AMA federation, including the Connecticut petitioners (Pet. App. 25a):

> [AMA's] lobbying efforts and advice on office and business practices—all designed to furnish assistance of economic value to its members—form a substantial part of its activities. The Association therefore bears a closer resemblance to a trade organization than to a strictly fraternal, scientific or charitable association.

In short, the evidence clearly supports the determination of the Commission and the court of appeals that AMA and its federated affiliates "are engaged substantially in activities which confer a pecuniary benefit upon their members" (Pet. App. 318a). To the extent that they are so engaged, their situation is no different from that of trade associations and other similar organizations that are subject to the Commission's jurisdiction.

II. THE COMMISSION PROPERLY EXERCISED ITS DISCRETION IN DETERMINING THAT THE COMPETITIVE RESTRAINTS IMPOSED BY THE AMA FEDERATION WERE UNLAWFUL AND REQUIRED A REMEDIAL ORDER

It is well settled that the Commission has wide discretion in determining the type of order necessary to bring an end to unlawful practices found to exist. See, *e.g.*, *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 394-395 (1965); *FTC* v. *Mandel Brothers*, 359 U.S. 385, 392-393 (1959); *FTC* v. *National Lead Co.*, 352 U.S. 419, 428-429 (1957); *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952); *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 611-613 (1946). In this case, the Commission exercised that discretion properly in "formulating a rule of conduct for the future as broad as the derelictions of the past." *Giant Food Inc.* v. *FTC*, 322 F.2d 977, 987 (D.C. Cir. 1963), cert. dismissed, 376 U.S. 967 (1964). The Commission was confronted with a record that overwhelmingly demonstrated AMA's long continued and "deeply

imbedded hostility to advertising, solicitation and contract practice by physicians" (Pet. App. 300a). It was reasonable for the Commission to conclude, in light of that history, that a remedial order was essential to "cure the ill effects of the illegal conduct, and assure the public freedom from its continuance.'" *United States* v. *Glaxo Group Ltd.*, 410 U.S. 52, 64 (1973), quoting *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 88 (1950).

This conclusion was reinforced by petitioners' conduct both before and after the initiation of the administrative proceedings against them. The evidence and the Commission's findings show that in the period preceding issuance of the Commission's complaint, and up until the eve of trial, AMA's restrictive practices continued unabated. Continuation of those restrictive practices was encouraged by carefully phrased announcements that "long-standing" prior policies were being "reaffirmed." To the ethical physician who has staked his livelihood on devotion to his patients and the respect of his peers, AMA never sent a message of "clear and unambiguous abandonment of the prior ethical restrictions" (Pet. App. 300a). Instead, as the Commission found, AMA resorted to equivocal restatements, wrapped in catch-phrases derived from the prior precedents of restraint, and couched to invite continuation by AMA affiliates of the old restrictions in the form of "local custom and usage" (*id.* at 356a-357a).

A. AMA's Defense Required The Commission To Make Extensive Findings On Liability

Contrary to petitioners' contention (Br. 31), the Commission did not act improperly in making extensive findings with respect to the anticompetitive restraints imposed by petitioners upon the medical profession. Although petitioners *now* assert that they "had no interest in defending and had repeatedly disavowed" their prior restrictive practices (AMA Br. 31), throughout the Commission proceedings petitioners vigorously defended the challenged restrictions while simultaneously claiming to have abandoned them (see note 21, *supra*).

At the same time that petitioners were contending before the Commission that administrative proceedings against them were unnecessary because the AMA federation was "evolving" into compliance with the law announced in *Goldfarb* v. *Virginia State Bar*, *supra*, they insisted on putting the Commission's staff to its proof on every material issue of fact and law. Thus, at the adjudicative hearing, complaint counsel were required to prove that the challenged restrictions on nondeceptive advertising by physicians and on contract practice were the result of AMA's ethical requirements, that those restrictions had prevented or injured competition among physicians, that they were unjustified under antitrust principles, and that they were the product of an agreement among AMA, its affiliates, and its members (see Pet. App. 268a-296a). On appeal before the Commission, petitioners continued to put in issue "the nature, scope and impact" of the challenged restrictions (*id.* at 328a), as well as the sufficiency of the evidence to sustain the extensive adverse findings set forth in the ALJ's decision (*ibid.*). In view of those adverse findings, however, petitioners claimed that they voluntarily had abandoned the positions outlined in the 1971 *Opinions and Reports* (*id.* at 350a).[44]

B. The Commission Properly Considered AMA's Pre- And Post-Complaint Behavior In Determining The Need For Relief

Petitioners contend (Br. 36) that only AMA's statements and actions following this Court's decision in *Goldfarb* are relevant on the issue of liability, and that the Commission therefore was required to close its eyes to the massive evidence of the AMA federation's prior unlawful activities. But petitioners' changes after the *Goldfarb* decision present a question separate from that

[44] Despite this shifting litigation posture, petitioners did not claim, either before the Commission (see Pet. App. 336a n.44; *id.* at 350a-351a) or before the court of appeals (AMA Ct. App. Br. 62), that the case was moot. They make that assertion for the first time before this Court (AMA Br. 38).

of liability: *i.e.*, whether, in light of the violations that were so clearly established, the changes in question demonstrated that the public interest would not be served by the issuance of a cease-and-desist order.

The Commission's resolution of that issue turned on its assessment, based on the administrative record, of the relationship between the unlawful restraints and the post-complaint actions and, more specifically, whether and to what extent those changes signaled the likely continuation, extinction, or revival of the unlawful restraints (Pet. App. 298a-300a, 350a-361a). Having found that the restraints had significant and unjustified anticompetitive effects and that serious violations continued up to the eve of trial, the Commission was not obligated to analyze in isolation the competitive consequences of statements published in the 1977 *Opinions and Reports* some 16 months after the complaint was issued, and to disregard completely all that had gone before. See *FTC* v. *National Lead Co.*, *supra*, 352 U.S. at 429.[45] As the court of appeals correctly held (Pet. App. 12a n.5), the Commission was not "required to amend its complaint at that point." The Commission, like a court, has "an obligation, once a violation of the antitrust laws is established, to protect the public from a continuation

[45] Petitioners' assertions (Br. 32) that the Commission disregarded the competitive significance of AMA's 1976 and 1977 statements on advertising, solicitation and contract practice is simply incorrect. The ALJ discussed at length the competitive effects of AMA's pre-and post-complaint positions, as well as AMA's asserted justifications for them (Pet. App. 268a-288a; see also *id.* at 243a-248a, 298a-300a (findings and conclusions on abandonment)). Moreover, in balancing AMA's justifications against the anticompetitive effects of the challenged pre-complaint restrictions, the Commission expressly held that it was proper to consider petitioners' arguments based on the 1977 *Opinions and Reports* because of the many similarities between the 1977 and 1971 statements (*id.* at 340a). The Commission correctly ruled, however, that the post-complaint changes were directly relevant not on the question of liability but in determining whether the effects of petitioners' prior misconduct had been dissipated and whether there was a danger of recurrence (*id.* at 350a-361a). Otherwise, issues concerning liability could never be resolved because of constantly shifting positions.

of the harmful and unlawful activities." *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 48 (1960). That obligation continues even if the unlawful activities have ceased.

Section 5(b) of the FTC Act, 15 U.S.C. 45(b), provides that if the Commission finds that a respondent has engaged in conduct prohibited by the Act, "it shall state its findings as to the facts and *shall issue* * * * an order requiring such [respondent] * * * to cease and desist from using such method of competition or such act or practice" (emphasis added). In enforcing this congressional directive, the courts consistently have held that voluntary discontinuance of an unlawful practice even prior to the issuance of a Commission complaint does not bar a cease and desist order when the public interest requires such an order. See, *e.g.*, *Fedders Corp.* v. *FTC*, 529 F.2d 1398, 1403 (2d Cir. 1976); *Diener's, Inc.* v. *FTC*, 494 F.2d 1132, 1133 (D.C. Cir. 1974); *Cotherman* v. *FTC*, 417 F.2d 587, 595 (5th Cir. 1969). Thus, the Commission was legally required to consider only whether the revisions "obviate[d] any need to enter the Order herein" (Pet. App. 15a).

Contrary to petitioners' contention (Br. 36-37), the Commission's reliance on pre-complaint violations is not inconsistent with *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 333 (1952), and *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633 (1953). Both cases held that when a violation has been found by a tribunal, the tribunal may, in its discretion, grant injunctive relief. In each case, the Court sustained the tribunal's determination because its remedial discretion had been reasonably exercised. In *Oregon State Medical Society*, the challenged practices were discontinued seven years before the complaint was filed; nevertheless, this Court stated that when a conspiracy in violation of the antitrust laws has been shown, "courts will not assume that it has been abandoned without clear proof" (343 U.S. at 333). The Court explained that "it is quite proper to trace currently questioned conduct backwards to illuminate its connections and meanings." *Id.* at 332. The Court added that examination of even clearly dis-

continued conduct is justified "when it illuminates or explains the present and predicts the shape of things to come." *Id.* at 333. Similarly, in *W.T. Grant*, this Court stressed that whatever determination it might have made de novo, on review the trial court's exercise of discretion to grant or deny relief is controlling absent a strong showing of abuse. 345 U.S. at 633.

Thus, the court of appeals properly held that "it is within the discretion of the FTC to determine whether an order is 'necessary to cope with the unfair practices found' " (Pet. App. 16a-17a, quoting from *FTC* v. *Colgate-Palmolive Co.*, *supra*, 380 U.S. at 392). "Congress has placed the primary responsibility for fashioning orders upon the Commission." *Ibid.* The Commission was empowered to fashion reasonable limits on AMA's future activities "both to avoid a recurrence of the violation and to eliminate its consequences." *National Society of Professional Engineers* v. *United States*, *supra*, 435 U.S. at 697. As we demonstrate below, the court of appeals was correct in concluding that the Commission "considered the changes and rationally assessed their significance in concluding that a cease and desist order was warranted" (Pet. App. 17a).

C. AMA's Post-Complaint Statements Did Not Demonstrate A Clear And Unambiguous Abandonment Of Its Unlawful Restrictions

As already noted, abandonment of unlawful practices does not diminish the Commission's discretion to enter an appropriate cease and desist order. Nevertheless, the Commission carefully examined petitioners' claim that they had abandoned the prior restrictions. The Commission's inquiry focused on whether the violations were likely to recur and whether an order was necessary to eliminate the consequences of the illegal conduct. *National Society of Professional Engineers* v. *United States*, *supra*, 435 U.S. at 697.

The Commission first looked at the post-complaint statements in light of its findings (Pet. App. 328a-350a) concerning the pervasive, long-standing and deeply entrenched system by which AMA and its affiliated medical

societies implemented and enforced the anticompetitive restraints. Those findings, sustained by the court of appeals (*id.* at 12a-14a), are not challenged here. Indeed, petitioners' brief studiously avoids reference to the Commission's adverse findings, which conclusively show that, contrary to petitioners' claims (Br. 29-30), AMA's restrictions on advertising and solicitation were not merely aimed at preventing deception and overreaching by unscrupulous physicians, but were, in fact "applied as an absolute ban governing situations in which the dangers contemplated by [AMA] are imperceptible if they exist at all" (Pet. App. 341a). Purporting to interdict the unscrupulous few, AMA broadly proscribed virtually "the full spectrum of advertising and solicitation activities" (*ibid.*), applying its ban " 'with equal force to both complicated and simple projects and to both inexperienced and sophisticated customers' " (*ibid.*, quoting *National Society of Professional Engineers* v. *United States*, *supra*, 435 U.S. at 692).

Moreover, both the Commission (Pet. App. 350a-361a) and the court of appeals (*id.* at 15a-18a) found that, in announcing its post-complaint changes, AMA acted tardily, reluctantly, and under the shadow of legal compulsion. Despite the *Goldfarb* decision's clear condemnation of collective price tampering by professional associations, "there is no evidence that AMA or its Judicial Council even reviewed its position on contract practice issues prior to issuance of the complaint" (*id.* at 358a). Indeed, no changes in AMA's contract practice restrictions were announced until the March 1977 edition of the *Opinions and Reports*, which, at the close of the evidence, had not yet been adopted by the House of Delegates (*id.* at 299a). In addition, three months after the decision in *Goldfarb*, AMA had proceeded no further than to consider the possibility of "updating" the sections of its *Opinions and Reports* dealing with advertising and solicitation. At the same time, however, the Judical Council continued to condemn advertising and solicitation by physicians as improper (*id.* at 351a). In fact, in September 1975, the Secretary of the Judicial Council wrote

that no major revision concerning these matters was necessary or advisable, and that "reasonable restrictions" would continue to be upheld (*id.* at 244a). No more definite position was reflected in the Council's November 1975 meetings (*ibid.*; *id.* at 351a-352a). In the meantime, distribution of the restrictive Guidelines on Telephone Directory Listings and the 1971 *Opinions and Reports* continued (*id.* at 245a). It was not until April 1976—four months after the Commission had issued its complaint in this case and some ten months after the decision in *Goldfarb*—that AMA released a statement reaffirming its position on advertising and solicitation. AMA explained that this statement was a response to "changing legal considerations" (*id.* at 245a).[46] Nearly a year later, the 1976 statement on advertising and solicitation was incorporated into the 1977 *Opinions and Reports*, in which AMA, for the first time after the issuance of the complaint, directly addressed the prior restrictions on contract practice (*id.* at 358a-359a, 368a).

The tardiness of AMA's response would have been sufficient in itself to justify a remedial order. But the Commission probed further and concluded that, despite decades of condemning all advertising and most contract practice, AMA "never unequivocally indicated to its members that the purportedly 'archaic' interpretations of the *Principles* contained in the 1971 *Opinions and Reports* had been superseded or rescinded" (Pet. App. 353a).[47] Nor, following *Goldfarb* and the Commission's complaint, did AMA identify any of its prior ethical

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[46] Petitioners suggest (Br. 7, 31) that this Court quoted approvingly from AMA's 1976 statement on advertising and solicitation in *Bates* v. *State Bar of Arizona*, *supra*, 433 U.S. at 369-370 n.20. As the Commission noted (Pet. App. 354a n.79), however, the Court was simply illustrating the extremely rigid position of the Arizona Bar toward advertising by attorneys. The Court was not attempting to pass judgment on the merits of AMA's restrictions on advertising.

[47] Cf. *United States* v. *Parke, Davis & Co.*, *supra*, 362 U.S. at 47-48 ("It does not appear even that Parke Davis has announced to the trade that it will abandon the practices we have condemned").

standards or interpretations that it considered to be contrary to law. On the contrary, the 1976 statement on advertising and solicitation expressly "reaffirm[ed] the long-standing policy of the Judicial Council on advertising and solicitation by physicians" (*id.* at 353a). Moreover, the 1977 revision of the *Opinions and Reports* was directly linked to prior versions, both by the terminology it used and by its reaffirmation of long-standing policies.[48] Yet, as the Commission noted, AMA did not even "make a straightforward, cautionary statement" to "advise its members not to rely upon copies of the 1971 edition in their possession" (*id.* at 353a n. 77).

AMA's reaffirmation of long-standing prior policies implicitly invited "members of the AMA and its constituent component societies to retain and to rely upon the more detailed ethical pronouncements included in the 1971 edition" (*id.* at 353a). To the member or local affiliate seeking guidance, it also was significant that the basic source of the unlawful restrictions—the 1957 *Principles of Medical Ethics*—remained unmodified. The *Principles*—which condemned "solicitation" and emphasized the "dignity and honor of the profession" (*id.* at 352a)—were overlaid with a thick precedential patina that conveyed to the medical profession long established connotations of restraint. Similarly, AMA never suggested that local affiliates should revise or update their own codes or guidelines, to which AMA members are

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[48] For example, the language used in the 1976 and 1977 statements to define "what the public is entitled to know" is almost identical to that used in the purportedly disavowed 1971 *Opinions and Reports* (compare J.A. 34 with J.A. 82). The 1977 *Opinions and Reports*, like the 1971 edition, reflected antagonism toward nondeceptive advertising in directories, mass media, and in communications with specialized consumers of medical services such as industrial employers (Pet. App. 353a-358a). AMA's feat of simultaneously changing and reaffirming its policy on advertising and solicitation is illustrated by the fact that a 1957 opinion took "an approach to advertising and solicitation remarkably similar to the approach taken in the 1977 edition" (*id.* at 353a n.75). To a physician faced with AMA's resurrection of its position from the mid-50's, it would appear "that, despite some semantic variations, nothing has really changed" (*ibid.*).

ethically bound (*id.* at 247a), and there is no evidence that the affiliates ever did so (*id.* at 245a).

Furthermore, given the long-cultivated hostility of the AMA federation to advertising by physicians, AMA's statement that local societies may adopt ethical restrictions that exceed the *Principles of Medical Ethics* (Pet. App. 356a-357a) was bound to encourage affiliated societies to adhere to the restraints expressed in the 1971 *Opinions and Reports*. This only increased the likelihood that the consequences of the unlawful restraints would continue to be felt. Because AMA had declared disregard of local custom by a physician to be unethical (*id.* at 329a), it was "inevitable that many physicians would be deterred from advertising, whether or not local societies take any specific action in this area" (*id.* 357a).

Similar ambiguities and uncertainties permeated AMA's belated actions with respect to "contract practice." As recently as January 1977, AMA informed the Commission that its policies on contract practice were best reflected in its restrictive 1974 *Report on Physician-Hospital Relations* (J.A. 5). And despite the fact that the 1977 *Opinions and Reports* contained changes in AMA's position with respect to contract practice that the Commission found to be significant improvements (Pet. App. 358a), AMA never expressly rescinded the 1974 *Report* and never warned its members that this widely distributed document contains obsolete restrictions (*id.* at 359a).

Predictably, therefore, up until the eve of trial, AMA's local affiliates continued to enforce the old restraints in the reasonable belief that nothing had changed.[49] Indeed, AMA's own physician witnesses, all distinguished members of the AMA hierarchy who were called specifically

[49] Certainly nothing had changed for the Connecticut ophthalmologist who was severely criticized in July 1976 for receiving favorable newspaper publicity, for the medical clinic director in California who was reprimanded in November 1976 for soliciting industrial clients, or for the Florida physicians who were denied malpractice insurance in June 1977 by a carrier because they had entered into "unethical" fixed salary contracts with a health maintenance organization. See pages 20-22, *supra*.

to testify about AMA's current positions on advertising and solicitation, continued to express the supposedly outmoded views reflecting AMA's pre-complaint positions. See pages 22-23, *supra*. If AMA's own officials perceived no change, plainly the majority of its physician members and its operating affiliates could not have been expected to do so.

There is a significant difference between the ambiguous positions expressed in the 1977 *Opinions and Reports* (see pages 17-20, 53-54, *supra*) and AMA's more recent expressions of its positions. But the additional steps undertaken by AMA following submission of the Commission's order to the court of appeals (see AMA Br. 7) only serve to confirm the Commission's holding that, on the record before it, there had been no clear abandonment of the practices found unlawful and that a remedial order was needed. In 1980, after the case had been submitted to the court of appeals, AMA issued a new ethics code (Pet. App. 30a n.4) that eliminated the ban on solicitation that had been the primary foundation of its traditional condemnation of advertising. More recently, AMA has indicated that nondeceptive advertising may be communicated "through any commercial publicity or other form of communication (including any newspaper, magazine, telephone directory, radio, television or other advertising)" and that appropriate fee information may be disclosed (AMA Br. App. b-1). There is, however, nothing in the record concerning the meaning of the 1980 *Principles*, the reason for their adoption by AMA, and the actions AMA may take to implement the revised *Principles* and rescind or modify its prior *Opinions and Reports* and other published interpretations of the 1957 *Principles*. Similarly, the record does not show whether these changes by AMA are permanent or are merely responses to the pressures of current litigation.[60] Moreover, AMA's 1977 *Opinions and Reports* continued to

[60] The new version of the *Principles* apparently was adopted on the advice of counsel in light of this litigation and other legal proceedings, over substantial opposition within the House of Delegates. We attach as an appendix to this brief a copy of relevant pages from *American Medical News* for Aug. 1/8, 1980.

leave its affiliated societies free to adopt restrictive interpretations of the *Principles*, and the testimony of AMA's own witnesses in this case (see pages 22-23, *supra*) indicates that opposition to abandonment of the challenged ethical restraints is likely to continue. This raises serious doubts whether, in the absence of a remedial order, the AMA federation is likely to achieve compliance with the law in practice as well as in theory. In sum, for purposes of judicial review of the Commission's order, the present actions by AMA do not undermine the Commission's determination on the record before it that a remedial order was necessary.[51]

D. Petitioners' First Amendment Claim Was Not Presented To The Commission Or The Court Of Appeals And Is Without Merit

Petitioners have raised a new argument in this Court. They assert (Br. 42-44) that the Commission's treatment of AMA's 1976 and 1977 statements fails to consider competitive policies and restrains "ideological speech" in violation of the First Amendment. They did not raise this contention before the Commission or the court of appeals,[52] nor is it fairly comprehended in the questions

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[51] The Commission's order cannot become effective until all review proceedings are completed (15 U.S.C. 45(g)). Upon becoming final, however, that order will provide clear guidance to the large membership and the many constituent and component societies that make up the AMA federation, and will help clarify the requirements of the law for those AMA members and affiliates who might be tempted to resist necessary changes from prior restrictive practices. Moreover, once the Commission's order becomes final and effective, petitioners may request the Commission to reconsider the need for an order on the ground that conditions have changed. See Section 2 of the Federal Trade Commission Improvements Act of 1980, 15 U.S.C. (Supp. IV) 45(b).

[52] AMA raised a different First Amendment issue in the court of appeals. It argued (AMA Ct. App. Br. 97-104) that Part II of the Commission's final order, forbidding AMA from continuing to use "ethical restraints" to unduly restrict physician "contract practice" and business arrangements (see Pet. App. 370a), was an unconstitutional "prior restraint." Commission counsel responded

presented in the petition for a writ of certiorari in this case. No extraordinary circumstances are present that would give "cause for deviating from [the Court's] normal policy of not considering issues which have not been presented to the Court of Appeals and which are not properly presented for review here." *Cort* v. *Ash*, 422 U.S. 66, 73-74 n.6 (1975). See also *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n.7 (1977).

In any event, the argument is insubstantial. It rests upon petitioners' persistent mischaracterizations of the Commission's findings and analysis concerning the practical relationship between AMA's past restrictions and its post-complaint changes. See note 45, *supra*. Moreover, petitioners' right of free speech and association does not include a right to restrain free competition by others. See, *e.g.*, *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 513-515 (1972). This Court's decisions make clear that the offering of professional services involves commercial speech that is subject to regulation under the antitrust laws. *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 764-765 (1976); *Goldfarb* v. *Virginia State Bar*, *supra*; *Bates* v. *State Bar of Arizona*, *supra*; *National Society of Professional Engineers* v. *United States*, *supra*.

The Commission's order does not prevent physicians from associating with each other for the advancement and development of beliefs and ideas, including those that affect commercial behavior. Cf. *Central Hudson Gas and Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980). Such association, however, cannot take the form of collective coercive action intended to prevent physicians from deciding for themselves whether they

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that the remedial provisions merely prevented AMA from committing further violations by use of the same means it had utilized in the past (see FTC Ct. App. Br. 101-104). The court of appeals held that Part II of the order was proper (Pet. App. 18a-19a), citing *National Society of Professional Engineers* v. *United States*, *supra*, 435 U.S. at 697, and *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 513 (1972). AMA has not challenged the scope of Part II of the order in this Court.

will engage in nondeceptive advertising, or from determining what contractual arrangements they will make when offering their professional services. As the Court stated in *Professional Engineers*, *supra*, 435 U.S. at 697:

> While the resulting order may curtail the exercise of liberties that the Society might otherwise enjoy, that is a necessary and, in cases such as this, unavoidable consequence of the violation. Just as an injunction against price fixing abridges the freedom of businessmen to talk to one another about prices, so too the injunction in this case must restrict the Society's range of expression on the ethics of competitive bidding.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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NOVEMBER 1981

APPENDIX

[SEAL]

August 1/8, 1980

American Medical NEWS

NEW ETHICAL PRINCIPLES FOR NATION'S PHYSICIANS VOTED BY AMA HOUSE

The American Medical Association House of Delegates adopted a new code of medical ethics, the first revision approved in 23 years.

The new principles received 195 favorable votes, 11 more than the two-thirds necessary to adopt them.

A special committee of the house was appointed in 1977 to investigate revising the 10 principles written in 1957 and was charged to focus on modernizing the language, eliminating reference to gender, and reaching an appropriate stance between professional principles and contemporary society. Since it was organized, the Ad Hoc Committee on the Principles of Medical Ethics, chaired by James Todd, MD, toured the country, soliciting opinions from all physicians at open hearings on the proposed revisions.

Debate during the reference committee hearings on the new code was lengthy, though argument on the house floor was kept to a minimum.

At both sessions, Dr. Todd spoke of the AMA's need for a new set of principles, particularly to alleviate some of the "legal pinches" incurred by the old set, but which, at the same time, "would articulate the goals of the profession and not merely be an accommodation to the legal profession."

He described the new principles as "broad, clear, positive statements . . . emphasizing dedication to and the privacy of the patient and emphasizing individual not collective responsibility.

"They use for the first time the word 'honest', they mandate modification of those requirements contrary to good patient care, and they guarantee freedom of choice for physicians and patients.

"Admittedly, these are substantial changes, but there is great danger in limited change or no change," Dr. Todd said.

Dr. Todd's statement about change was challenged by several delegations during the reference committee testimony.

Sidney Foster, MD, alternate delegate from California, said he recalled the emotional testimony that accompanied the revision of the principles in 1957. "The old principles served us well," he said and added "For the present as they stand now, they would serve us better (than the new). They are stricter. The new are too loose to serve as guidelines."

THESE NEW PRINCIPLES, he continued, should respond to legal challenges as necessary. "Base the new principles on the old and make changes that are minor," he said.

Added California delegate William Weil, MD, "We think that the reference committee should ask the Board of Trustees what are the minimum changes to satisfy the legal problems, and then change the ethics in that manner."

The delegation from Indiana voiced agreement with the Californians. "Indiana is opposed to the new set of principles," said Marvin Priddy, MD, alternate delegate from the state. "We want a minimum amount of change."

John P. Seward, MD, 1979 president of the Illinois State Medical Society (ISMS) countered the minimal change argument with statistics from an ISMS survey. He said ISMS had conducted a study on how the society membership felt about ethics changes. A majority of those responding, he said, felt that the medical ethics needed to be changed.

Trustee William Hotchkiss, MD, also testified during the hearing, to state the position of the Board of Trustees on the revised code, he said.

"The Board of Trustees has a fiduciary responsibility to protect the assets of our membership. Legal counsel tells us that we need to change the principles," Dr. Hotchkiss said.

HE ALSO SAID that the attorneys had singled out section 3 of the old principles as hampering the AMA's defense position in outstanding chiropractic lawsuits. "If we should lose these suits," he said, "the damages requested could bankrupt this Association." (Four suits filed by chiropractors against the AMA, asking millions in damages, are still pending.)

Dr. Hotchkiss also said that section 5 of the old principles was interpreted by the Federal Trade Commission as forbidding advertising, and that, too, had to be changed.

The debate on the house floor the day after the reference committee hearing was limited to a few objections, with these members speaking against passing a new set of medical ethics because of outside forces, such as the FTC.

The house, however, rejected these arguments. In quick succession, it voted to file a report from the ad hoc committee on a history of ethics and an evaluation of the old set of medical ethics, then adopted the new principles, and approved a recommendation from the reference committee that the house "develop a mechanism whereby the AMA Principles of Medical Ethics periodically be reviewed and revised as dictated by contemporary changes in the profession."

Board Chairman Lowell Steen, MD, at a press conference following the house vote said that he was "delighted with the house vote.

HE SAID THAT he thought that the opinions and reports of the Judicial Council which interpret the AMA's Principles of Medical Ethics would probably have to change with the adoption of a new set of ethics.

Dr. Todd said that he was pleased that the Association delegates had passed the principles.

He added that while the principles developed by the AMA are for its members, "we would hope that all physicians would aspire to them."

—Judy Alsofrom

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 [illegible]